

Q. How long was your contract?

A. A one-year, limited contract.

Q. What program did you work in during this year?

A. I worked for the "English as a Second Language" program in Cleveland.

Q. And could you describe the program generally?

A. Yes. It is a federally-funded program which works in schools that qualify as Title 1, for Title 1 programs and funds; and what it primarily does is teach English to foreign speaking people or students in the Cleveland area. There are, I think, at that time there were about nine or ten schools in the program.

Q. And at what school were you teaching?

A. I was teaching at Tremont.

Q. Where is it located—Tremont?

A. It is on the near west side.

Q. And who is the principal at Tremont at the present time?

A. Mary Colby.

Q. Can you describe your work?

A. Yes. I screen-tested and taught approximately six foreign speaking students at Tremont schools. I was responsible for teaching them English, or the oral method, and also responsible for reading and writing, for these students.

Q. And did you use any tape recorders?

A. Yes, I did.

Q. O.K.; and did you have an aide with you when you were teaching?

A. Yes, I did. All of the teachers in the ASL program had aides.

Q. What did the aides do?

A. She was responsible for bringing my students to

my classroom and returning them after their half hour or hour class was over with.

She was responsible for doing interpretive work, not only for me, but also helped out the principal. Say that a student—somebody needed a letter written in Spanish, and she would be responsible for that; and she did bulletin board work and artistic work, and things like this.

Q. Did you become pregnant during the school year?

A. Yes, I did.

Q. When did you find out that you were pregnant?

A. In the middle of October.

Q. And after you found out, did you tell your supervisor?

A. Yes, I did.

Q. And when did you tell her?

A. I can't remember the exact date, but it was the end of November or early December.

Q. And you told your principal too?

A. Yes, I did.

Q. And did your principal tell you that you would have to resign?

A. Yes, she did.

Q. Did you in fact resign?

A. Yes, I did.

Q. And at the end of what month of your pregnancy did you resign?

A. It was at the end of my fifth month.

Q. And what day was that? When was the last day of teaching?

A. I don't have the paper, but it was February 7th or February 10th. I don't know for sure.

Q. And at the time that you discussed resignation with your principal, did you ever offer to waive liability so you could continue teaching?

A. Yes, I did.

Q. Now, did you ever inquire about doing volunteer work for your supervisor or principal?

A. Yes, I did. I inquired with my supervisor.

Q. And what did she suggest?

A. She knew of a school that did not qualify for Title I funds, but at the same time had the need of a special teacher who could teach English, because there was a large number of foreign speaking students at the school, and they were right in the regular classroom with the other students, and she asked me if I would be interested in volunteering at the Barkwill School.

Q. And did you in fact decide to volunteer to teach at the Barkwill School?

A. Yes, I did.

Q. And where is the Barkwill School located?

A. Around 55th and Broadway.

Q. Who was the principal of Barkwill School.

A. Miss Fuchs, F-u-c-h-s.

Q. And you discussed volunteering with Miss Fuchs?

A. Yes, I did.

Q. How many days a week did you work?

A. I taught two days a week.

Q. Well, was there any reason why you taught two days rather than five?

A. Yes. The reason was because I could get transportation to and from the school on those two days of the week.

Q. I see; and did Miss Fuchs know you were pregnant?

A. Yes.

Q. Did she know when your baby was due?

A. Yes.

Q. What were your duties at Barkwill?

A. They were primarily the same as Tremont; however, I had approximately 30 students rather than the six I had at Tremont, and I was responsible because I did not have an aide, and it was not ASL title, because I was doing it as a volunteer.

I was responsible for bringing the students to my class and returning them, which meant walking around the building.

Q. And you didn't have an aide?

A. No.

Q. How long did you teach?

A. I taught from the middle of February until the middle of May.

Q. And in relation to your pregnancy, how long did you teach?

A. It was the end of my eighth month.

Q. How many times were you absent during this volunteering?

A. Once.

Q. And what was the reason for this absence?

A. Because the girl who drove me could not come. She had to leave town.

Q. Did the students at Barkwill know that you were pregnant?

A. Yes, they did.

Q. How did they react to your pregnancy?

A. If anything, they acted very genteel and kind of comparative about it, because they were making statements as, "My mommy just had a baby," or, "My mommy had twins," or, "What are you going to have, a boy or a girl;" and that was from my own students, and because I did come into contact with students as I went through the halls to pick up my own students, I never experienced any form of hostility or mockery or whatever. It was favorable.

Q. There were no snide remarks or giggling?

A. No.

Q. Did you teach boys and girls?

A. Yes, I did.

Q. Now, how about Tremont, which is the school you taught at first. Did the students at Tremont know you were pregnant?

A. At the end they did.

Q. Did they react unfavorably?

A. No. They asked why I had to leave.

Q. O.K.

Now, did you notify the principal at Tremont that the last day of teaching would be at the end of your fifth month?

A. I did.

I have to say the issue of time was very confused. Do you want me to go into it?

Q. Yes.

A. O.K.; because when I first notified her it seemed to me that she thought I could also work to the end of my fifth month. There was a problem of communication or whatever, and so what she did was counted back and forth. She counted back—I was due in June, and she said, "June, May, April, March," and I could work until the end of February. O.K.

And then the second time I spoke with her I think she asked me my exact date, and I said it would be between the first two weeks—sometime within the first two weeks of June; and so she counted back again, like June 10 to May 10, and so forth, and got back to the first of February.

And then the third time I spoke with her there were five or six girls at Tremont school that were pregnant, and I don't think she actually had a list of exactly the dates that everybody was due; so she had us all come into the office and state specifically the date; and at that time she said, "You have to leave at the end of the fourth month."

Well, about that time it was the end of January, so I left within the week, or I left the first week of February.

MISS AGIN: No further questions.

CROSS-EXAMINATION OF KATHRYN TUCKER

By Mr. Clarke:

Q. Just a couple of questions, Mrs. Tucker.

Barkwill School is the school where you taught voluntarily for two days a week?

A. Yes.

Q. Were you actually responsible for that class, or was there a responsible teacher there too?

A. There was not a responsible teacher there.

Q. Go ahead.

A. I was responsible for the students.

Q. What were you teaching them?

A. I taught English as a second language, which means the method is a little different than you taught in a regular classroom.

Q. What was the native language?

A. There were Puerto Rican children and Mexican; so it would be Spanish in that case, and also there were several children from Yugoslavia, which in that case it would be Serbian.

Q. Croatian?

A. Right.

Q. You were then teaching twice a week as a volunteer, as a special teacher then?

A. Yes.

Q. That is all I have — for three months?

A. From February to May.

Q. That is three months.

A. Right.

MISS AGIN: One further question, please.

REDIRECT EXAMINATION OF KATHRYN TUCKER

By Miss Agin:

Q. As a volunteer you were not paid?

A. No. I was not paid.

Q. And when was your baby born?

A. My baby was born June 10th.

MR. KATZ: Your Honor, in view of the hour, I would like to beg the Court's indulgence. We have four witnesses, and one witness to take a deposition of, re-

maining. Because they were all professional witnesses, we have had to schedule them at different times, and we only have one witness scheduled this afternoon, and he is scheduled to be here at 2:30.

I am afraid we could not get the people to rearrange their schedules any more than they have.

THE COURT: Couldn't you get him to come in at 2:00 o'clock?

MISS AGIN: We could try to reach him.

(Thereupon the court was adjourned for the luncheon recess.)

APRIL 19, 1971; 2:00 O'CLOCK P.M.

THE COURT: Please be seated and proceed.

MR. CLARKE: May it please the Court, Mr. George Pring of our office will be sitting at the counsel table.

THE COURT: Yes. Thank you.

MISS AGIN: Your Honor, I am ready to call the next witness.

THE COURT: Proceed.

MISS AGIN: We call Dr. Rutenbeigs.

DR. VERNERS RUTENBEIGS, having been called as a witness on behalf of the plaintiffs, after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF DR. VERNERS RUTENBEIGS

By Miss Agin:

Q. Please state your name and occupation.

A. Verners Rutenbeigs; V-e-r-n-e-r-s R-u-t-e-n-b-e-i-g-s.

Q. Now, I would like to go into your education and background a little bit. Could you please tell the Court where you went to college.

A. I went to Western Reserve Adelbert College.

Q. And medical school?

A. Ohio State University.

Q. And internship?

A. St. Luke's Hospital, Cleveland, Ohio.

Q. Did you spend any time in the Army?

A. I was in the Army for two years.

Q. And then your residency?

A. St. Luke's, Cleveland, Ohio; three years.

Q. What did you do your residency in?

A. Obstetrics, gynecology.

Q. Where are you practicing now?

A. Kaiser Foundation, Cleveland, Ohio.

Q. How long have you been at Kaiser?

A. A year and a half.

Q. How many pregnant women have you treated in a professional capacity?

A. I would say in three years, and of one and a half at Kaiser, about 1,000.

Q. And has the plaintiff, Ann Nelson, been one of your patients?

A. Yes.

Q. How long has she been under your care?

A. Since the middle of January, '71.

Q. And is she in good health?

A. She is.

Q. Has she asked you whether she can continue to teach?

A. She has done that, yes.

Q. What is your medical opinion? What did you tell her?

MR. CLARKE: Just a moment, please. I object unless it is further questioned as to the witness's knowledge of what the teaching conditions are under which this lady would perform her duties.

Q. Are you familiar with what a teacher does generally?

A. I understand she is a French teacher, and - -

THE COURT: Wait. Put the question again, and follow the question. Read the question.

(Thereupon the pending question was read by the court reporter.)

A. Yes, because I have been in junior high.

THE COURT: The answer is, "Yes." Just answer the question, please. Don't volunteer. We will go faster. Go ahead.

Q. So you are familiar?

A. Yes.

Q. And you did answer her question as to whether in your opinion, based on your knowledge of teaching and her job, she could continue to teach?

A. I said she could.

Q. How long did you feel, and did you tell her, she may continue to teach?

A. I feel that she could teach as long as she felt motivated to do so.

Q. And you told her this?

A. Yes.

Q. Of the one thousand pregnant women that you have treated, do you have any idea about how many were employed, or told you that they were employed?

A. That would be a guess. I really could not tell exactly.

Q. But if one of your patients who was pregnant told you that she worked, and the job was similar to teaching, if not teaching, and if she were in good health, would you tell that patient, and have you told such patients, that they could continue working in their pregnancy?

THE COURT: Wait a minute. You have got a dozen questions in one, so I can rule on each one if necessary, and hold up a minute.

Now, put a question please. Just one question at a time. They can object, and I will understand.

Q. In the past, if a patient of yours was in good health and had a job as a teacher and asked if she could continue to teach during her pregnancy, how would you advise her?

A. I would say that they could teach except if they were involved in teaching gym.

MR. CLARKE: Except what?

A. (Continuing) — if they were teaching gym classes, physical education classes.

Q. Could you generalize about pregnant women teaching classes which are not gym classes as to their physical capacity to teach during pregnancy?

MR. CLARKE: Objection.

THE COURT: Sustained.

A. They are — if they are in good health —

THE COURT: Wait a minute. Put a question, and that wasn't one — "could you generalize."

MISS AGIN: Yes; but could he give a general opinion?

THE COURT: I ruled on that. Put another question if you have one.

Q. Do you believe that women can continue working during pregnancy?

A. I believe they may do so, yes.

MISS AGIN: That is all.

MR. CLARKE: May I proceed?

THE COURT: Yes, sir.

CROSS-EXAMINATION OF DR. VERNERS RUTENBEIGS

By Mr. Clarke:

Q. Dr. Rutenbeigs, what was the date of your graduation from Western Reserve University?

A. 1959.

THE COURT: '59?

THE WITNESS: June, 1959.

Q. What is the date of your graduation from medical school at Ohio State University?

A. June, 1963.

Q. And subsequent to that you were an intern at St. Luke's?

A. Yes.

Q. During what years?

A. '63-'64.

Q. In '63-'64, did you have the sole responsibility for those patients whom you examined — those pregnant patients?

A. No; not as an intern.

Q. Then — by the way — did you include any of those ladies in your estimate of 1,000 that you have treated?

A. During the internship; no.

Q. Now, your residency — when were you a resident at St. Luke's?

A. 1966 to 1969.

Q. And that was OB-GYN?

A. That is correct.

Q. In what instances did you have the responsibility for pregnant ladies who were patients of yours?

A. On and off during the training. I was involved with pregnant ladies, I would say, about half of the time in the year and a half.

Q. I know you were involved with pregnant ladies, but wasn't somebody else their principal doctor during your residency?

A. No. I would say for about a year of that time I probably was almost completely responsible. If there were any major problems, then I would go to a staff man who was in charge of the Service, but otherwise I would be pretty much completely in charge.

Q. Were these patients of the private OB-GYN's who had the women in as private patients?

A. No. They were of the staff patients, mostly ADC patients that were coming to St. Luke's Clinic.

Q. Most of the ADC patients then were, by definition, not employed?

A. That is correct.

Q. So most of the people you examined, and for whom you had the responsibility during your internship, were unemployed and on Aid to Dependent Children?

A. During the residency, yes.

Q. You have been with the Kaiser Foundation how long?

A. A year and a half.

Q. Approximately how many patients have you examined during that period with OB problems; that is, pregnant women?

A. I would say about 300 to 350.

Q. That is in the last year and a half?

A. Yes.

Q. Now, Doctor, you, as a doctor, in talking about the term, the nine-month term for delivery of a human fetus, pretty generally divide that up to a trimester; the first trimester, the second trimester, and the third trimester?

A. Yes.

Q. And the first trimester is the first three months. That is the period of morning sickness?

A. Correct.

Q. And also do you not, as a doctor, divide the loss of the fetus as to whether or not it occurs during the first 20 weeks or the latter weeks of pregnancy?

A. Correct.

Q. And the first 20 weeks, if the fetus is lost, it is determined either a miscarriage or abortion?

A. True.

Q. And the last 20 weeks, if the fetus is lost, it is determined a live birth or still birth?

A. Yes; after 20 weeks.

Q. Now, I am talking about, not about the second trimester, but the third, the seventh, eighth, and ninth months of pregnancy.

There are certain problems that occur in normal healthy women having a normal healthy child during these last three months of pregnancy, are there not?

A. That is correct.

Q. Well, that is why the doctors advise, during the last three months, why they need the doctor's advice?

A. True.

Q. And it is important in good medical treatment for a pregnant woman to be under a periodic examination by a doctor?

A. True.

Q. Now, a pregnant woman during her term can be expected to gain between 15 and 20 pounds in weight, can she not?

A. True.

Q. And her center of gravity changes during that period of time, doesn't it, Doctor?

A. It probably does, yes.

Q. That is to say, sometimes during that nine-month period, with the growth of the fetus in the lower abdominal area, the woman's center of gravity changes?

A. Yes, sir.

Q. And as the fetus grows, that increases the pressure on the uterus, doesn't it, or on the — what is that part of the anatomy that holds the urine?

A. The uterus, where the urine comes out?

Q. Yes, where the urine is held prior to its expulsion.

A. The bladder.

Q. That increases the pressure on the bladder?

A. Yes, it does.

Q. And the frequency of urination in the last three months is greater than the non-pregnant woman?

A. True.

Q. And also the pressure of the growing child within the woman's body presses upward into the areas of the stomach, does it not?

A. True.

Q. And that has its effect upon the appetite of the pregnant woman, does it not?

A. The pressure; no.

Q. Let me withdraw that question and put it this way:

Doesn't the presence of the fetus in the later months of pregnancy have an effect on a pregnant lady's desire of when she wants to eat, and when she is hungry; that she wants to eat all the time? Hasn't that been your experience?

A. No.

Q. No?

A. I think increased appetite during pregnancy might be on the basis of a hormone change. You have more desire for different kinds of food, because of hormonal changes.

Q. In any event, there is a desire for different types of food, and that is on the basis of a hormone change in the body.

It is a very good normal thing; isn't it?

A. Well, not necessarily. It depends how much weight they are gaining. If they are gaining too much, it is a bad thing; and if not enough, then it is probably a good thing.

Q. Well, a high protein diet is essential, I take it?

A. Yes.

Q. The type of diet that may not necessarily have been available to her prior to her pregnancy?

A. Well, yes.

Q. Now, when a lady has reached the eighth month of a pregnancy, and has gained between 15 and 20 pounds, and has changed her center of gravity, is she able to engage in physical exertion at the same speed and at the same agility with which she engaged in that prior to her pregnancy?

A. Probably not with the same agility and speed.

Q. What is a placenta previa, Doctor?

A: That is where the placenta is in front of the cervix, or the opening where the baby is delivered through.

Q. Actually there could be different types of a placenta previa, depending on the degree of covering of the cervix?

A. True.

Q. And a placenta previa in a pregnant lady beyond six months pregnant is a very serious thing?

A. Yes.

Q. It can lead to sudden bleeding and death, can it not?

A. True.

Q. And can a placenta previa be induced by sudden, quick, physical exertion?

A. It could.

Q. What is the toxemia of pregnancy, Doctor?

A. That is poisoning of a pregnancy.

Q. What causes that?

A. No one knows.

Q. What are the symptoms?

A. Weight gain, protein in the urine, and swelling.

Q. How about high blood pressure?

A. True.

Q. Can you relate to high blood pressure of the toxemia of pregnancy to that which causes high blood pressure in the normal human being; that is, excitement, stress, exertion, and the sort of thing that would cause a person's blood pressure to go up in a normal person? Can you relate that high blood pressure to the toxemia of pregnancy?

A. No.

Q. Doctors don't know whether that is or is not the cause?

A. They don't know the cause.

Q. That likewise is a very serious thing, is it not?

A. That is.

Q. And when you find that in one of your patients, you hospitalize her?

A. Usually, yes.

Q. Doctor, you testified that you were familiar with the conditions under which teachers practice their profession in the public schools today. Are you familiar with the number of incidents of assaults upon teachers in the Cleveland public schools in the last two years?

A. Not the number, no.

Q. You are familiar with the fact that such assaults have occurred?

A. Yes.

Q. Do you know how many?

A. No.

MR. KATZ: Objection. That would not be within the witness's knowledge.

THE COURT: What?

MR. KATZ: Within the witness's knowledge.

THE COURT: He will have to say that, not you.
Put the question again.

Q. Have you ever been in Patrick Henry Junior High School, doctor?

A. No.

Q. Have you ever been in Central Junior High School?

A. No.

Q. When was the last time you were inside any junior high school within the limits of the City of Cleveland?

A. Early '50's.

Q. So your familiarity with the interior of a junior high school in the City of Cleveland goes to the early 1950's?

A. True.

MR. CLARKE: That is all I have.

THE COURT: May we find out what high school he is talking about?

MR. CLARKE: Yes.

Q. What high school, what junior high school did you enter in the early '50's, if you recall?

A. It is on the east side. I can't remember the name offhand.

Q. Perhaps you would tell the Court the occasion of your being there?

A. I was in junior high. I was a student there.

Q. In a Cleveland junior high school, in the 1950's?

A. Correct.

THE COURT: Where was it located?

THE WITNESS: 55th and Broadway, Myron T. Herrick.

Q. And you are a graduate of Myron T. Herrick?

A. That is right.

Q. And your familiarity with conditions goes to Myron T. Herrick, when you were there as a student?

A. True.

MR. CLARKE: That is all. Thank you, sir.

REDIRECT EXAMINATION OF DR. VERNERS RUTENBEIGS

By Mr. Katz:

Q. Doctor, you were asked about the change in the center of gravity on cross-examination. When does that occur?

THE COURT: May I ask the question; who asked him on direct examination?

MR. KATZ: Miss Agin.

THE COURT: Then she has to take him over. You can't switch.

MR. KATZ: Yes, your Honor.

THE COURT: Let's follow the rules.

By Miss Agin:

Q. Could you tell me when the change of the center of gravity occurs?

A. I would say at the end of the pregnancy.

Q. At the end of—

A. After six months, when the abdomen is markedly increased in size.

Q. Now, the change in pressure in the uterus; when did this occur?

A. I think that probably starts from the very beginning. As the contents get bigger, they probably increase the pressure inside the uterus.

Q. Now, with respect to the change in the center of gravity, how does that affect the patient? Which change does that produce in the patient?

A. Occasionally it might cause difficulty in keeping balance, but that is not a common situation.

Q. Not common.

Would you say that this change in gravity would in any way affect a pregnant woman's ability to walk up and down the stairs or stand in a classroom?

A. If she is careful, no.

Q. Now, this placenta previa that Mr. Clarke referred to; would you say that walking or standing could cause this condition?

A. That would not cause the condition, but if you have the condition—if someone was a gym teacher, would be driving, or horseback riding, she could probably stir up bleeding; but if someone had a placenta previa, I would say anything could set up bleeding.

Q. But if a person did not have this condition, would it be your opinion that walking upstairs or standing or walking would cause bleeding?

A. It could occur for other reasons. It could occur for other reasons.

Q. To your knowledge does Elizabeth Ann Nelson have a placenta previa?

A. I would say her chances are probably just like anyone else's, which might be one chance in 200 to 250.

Q. Does she have a toxemic pregnancy?

A. Not at this point.

Q. What are the chances of her developing a toxemic pregnancy?

A. I would say just like anyone else's chances, which probably is about 9-10 percent.

Q. Would you say that if a patient is under fairly constant medical care, that there is a better chance of avoiding a toxemic pregnancy?

A. That is true.

MISS AGIN: That is all, your Honor.

MR. CLARKE: Just one question.

RE-CROSS-EXAMINATION OF DR. VERNERS RUTENBEIGS

By Mr. Clarke:

Q. I have just one question about the toxemic pregnancy. Is the onset totally unforeseen, absent the development of those symptoms; isn't that true?

A. The symptoms occur slowly, and that is why patients come on a regular basis to see us.

Q. Right; but until you get the symptoms in the urine and high blood pressure, it could be totally unforeseen, and would appear to you as a normal pregnancy?

A. That is right.

Q. So until those symptoms appear, it is totally unforeseen?

A. That is true.

MR. CLARKE: Thank you, sir.

MISS AGIN: One further question, your Honor, if I may.

Q. Now, the change in pressure in the uterus; when did this occur?

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MR. CLARKE: Thank you, sir.

MISS AGIN: One further question, your Honor, if I may.

FURTHER REDIRECT EXAMINATION OF
DR. VERNERS RUTENBEIGS

By Miss Agin:

Q. If your patient developed a toxemic pregnancy, would you recommend at that time that she discontinue her duties and stay home?

A. No. She probably would be admitted to the hospital.

FURTHER RECROSS-EXAMINATION OF
DR. VERNERS RUTENBEIGS

By Mr. Clarke:

Q. I take it your answer is not "No," but, "Yes," you would recommend the termination of her teaching duties if you had a diagnosis of a toxemic pregnancy?

A. That is true.

MISS AGIN: No further questions.

THE COURT: That is all, sir.

MR. KATZ: Your Honor, due to the schedule of our witness we have no further witnesses scheduled for this afternoon. Mr. Clarke and I have discussed this matter, and he has agreed to put on one of his witnesses this afternoon.

MR. CLARKE: I have a witness ready, if I have your Honor's consent to put him on out of order.

THE COURT: Surely.

MR. CLARKE: And I have the consent of plaintiff's counsel?

MR. KATZ: Yes, you do.

DR. WILLIAM C. WIER, having been called on behalf of the defendants, after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF DR. WILLIAM C. WEIR

By Mr. Clarke:

Q. Now, Doctor, please speak out in a loud, clear voice. We want to make sure his Honor hears everything.

Tell the Court your name, please, sir.

A. William C. Weir.

Q. Where do you live, sir?

A. 2571 North Park Boulevard, Cleveland Heights, Ohio.

Q. What is your profession or occupation?

A. Physician.

Q. Will you tell the Court something of your formal education, college and professional.

A. I graduated from Harvard College with an AB degree in 1931, and from Harvard Medical School with an MD degree in 1935.

I had a rotating internship in medicine and surgery at the Faulkner Hospital in Boston, and I had a two-year straight surgical internship at the University Hospitals here in Cleveland, and I had three years in obstetrics and gynecology, residence training at the University Hospitals of Cleveland.

Q. Following the completion of your three years' residency in OB and GYN at the University Hospitals of Cleveland, what did you do, sir?

A. I just started in practice, and then went into the Navy. I finished in 1941, and went into the Navy in March of 1942.

Q. How long did you serve in the United States Navy?

A. Three and a half years.

Q. What was the nature of your professional work during your Navy service?

A. Well, it was mostly just general medicine for the first two and a half years, plus—but in the last year I was sent out to the United States Navy Hospital in Seattle to work as a gynecological consultant for the Fourteenth Naval District.

Q. So you ended up your career in the Navy as an OB-GYN?

A. Yes.

Q. —GYN, at least?

A. Yes.

Q. There were babies in the Navy Hospitals, too?

A. Well, the obstetrical service was run for the dependents. I was in charge of the Waves.

Q. Subsequent to the completion of your Naval service, what did you do, sir?

A. I went into private practice.

Q. Whereabouts?

A. Cleveland.

Q. Doing what work?

A. Obstetrics and gynecology.

Q. This would be in 1946?

A. Yes, sir.

Q. How long did you remain in private practice in general OB-GYN in Cleveland?

A. I remained in OB and GYN up until approximately two and a half years ago, when I stopped doing obstetrics and confined myself to the field of infertility.

Q. Will you tell the Court what you mean by the "field of infertility"—which is what you are engaged in at the present time, I take it?

A. Yes. May I preface by saying that I became interested in the problems of infertility, of couples having difficulty having children, shortly after I got out of the service and was appointed the Chief Gynecological Consultant at the Infertility Clinic at the Maternal Health Association, where I worked for 20 years until it was phased out in 1968.

And just about that time I was delivering a lot of babies of these girls that got pregnant in the clinic, and I had a fairly large infertility practice of my own, and would deliver these patients; and then about two and a half years ago I thought I was getting a little bit too old to get up in the middle of the night, and I decided to confine my work strictly to the infertility problems.

Q. Now, are the problems of infertility the problems of married couples who are having trouble in conceiving and having children?

A. That is correct.

Q. And your specialty has been trying to make it possible for them to have children?

A. Right.

Q. That has been your specialty at least in the two years since your retirement from active obstetrics?

A. Yes, because I was active in obstetrics for 20 years, very active.

Q. Do you do any consulting work on the faculty and medical schools of Case-Western Reserve?

A. I have been a member of the faculty of the medical school ever since I returned to Cleveland, in 1936; and I am now Associate Clinical Professor of OB and GYN.

Q. You have been a member of the faculty 20 years, and you are now an associate clinical professor?

A. That is correct.

Q. Thank you, sir.

Could you estimate how many babies you have delivered, including at least one Clarke?

A. Well, I would put it this way: When I was in active OB practice I would average between 10 and 20 babies per month, now, that would be 120 to 200 per year, and 20 years. You may add that up.

Q. Babies from all classes and creeds?

A. Yes.

Q. From all types of races?

A. Yes.

Q. Have you during the course of your work ever published anything?

A. Yes. I have published many papers in the area of infertility.

Q. And have those been printed in the Medical Journal?

A. They have appeared in many different medical journals, but more in the Fertility and Sterility Journal.

I have given papers to many medical meetings here and abroad, at the World Congress of Infertility in Stockholm, Israel, and New York, and Rome.

Q. Doctor, I take it that you are a member of a number of medical societies?

A. Yes, I am.

Q. Are there any particular medical societies in your specialty in which you are a member?

A. Yes. There is the American College of OB and GYN; and I am a Founding Fellow of that. I am one of the original members of the American Fertility Society, and I am a member of the Cleveland Obstetric and Gynecological Society as well.

Q. I am going to ask you if you are a Fellow, but I take it you are a Founding Fellow?

A. That is the American College of OB and GYN. That was just started up shortly after the war, and they made me one of the Founding Fellows.

I am also a Diplomate of the American Board of OB and GYN, and I was made a Diplomate in 1941.

Q. I suppose it goes without saying that you are licensed to practice medicine in the State of Ohio?

A. Correct.

Q. Now, sir; I would like to ask you some questions, generally, about the nature of pregnancy and the problems of pregnancy. Let's start out by having you tell the Court about a normal, healthy lady who becomes pregnant. What is her average weight gain during the term of her pregnancy?

A. This varies considerably. The average weight gain considered healthy is 20 pounds throughout the pregnancy. Many patients put on more than this without any detrimental effects.

Q. Is the weight gain something that a doctor observes carefully?

A. Every patient is weighed every time she comes in the doctor's office, to watch this weight gain.

Q. Do you, as a physician, divide up the nine-month period into say three periods?

A. Yes. We have a first trimester, the second trimester, and the third trimester.

Q. Why do you make such a division?

A. Well, because the complications that occur in each of these things, which are a little bit different than the others.

Q. Tell us, first, briefly, what the complications of the first three months are.

A. The first three months are primarily a spontaneous abortion, and nausea and vomiting, and headaches, and so on.

Q. What are the causes of spontaneous abortion during the first three months of a pregnancy?

A. Well, we are not always sure of this. We think primarily they lie in two areas:

(1) There is some defect in the fertilized egg, and nature throws it off.

(2) We feel that the fertilized egg might be implanted in the portion of the wall, the interwall of the womb, where it doesn't get sufficient nourishment, and nature again discards it.

Q. By the way, will you describe the difference between a miscarriage-abortion on one hand, and live and still-birth on the other; if there is such a distinction.

A. Yes. Actually it is legal now, that any pregnancy that is terminated before up to 20 weeks is considered a miscarriage or an abortion.

Q. Are those words interchangeable?

A. Yes. They do not require any certification or any legal things involved.

Any pregnancy that terminates after 20 weeks legally requires either a stillbirth certificate or a live birth certificate.

Q. Very well, sir.

Now, have we completed most of the complications of the first trimester of pregnancy?

A. —or spontaneous abortion or hyperemesis gravidarum, which is a very severe nausea that requires bed rest.

Q. Now, what complications occur during the second trimester of pregnancy? This is the fourth, fifth, and sixth month.

A. We do run into prematurity in this trimester, and we do have a spontaneous patient going into labor and spontaneously delivering a premature child; and we do have a toxemia of pregnancy in this of the earlier forms; and sometimes it is severe, and this is characterized by high blood pressure, and in very severe cases, of convulsions.

Q. Can a toxemic pregnancy be foreseen before you get certain symptoms?

A. Yes, to a certain extent. We follow our patients, and if we notice a rise in blood pressure, or the appearance of albumin in the urine, we are alerted that we may have a potential toxemic patient on our hands.

Q. How frequently does the toxemic pregnancy occur?

A. We speak of it as a general term. It varies in the economic groups, and it is as high as 10 percent in the lower economic groups, probably 10 percent of the women that come in to MacDonald House have some indications of toxemia, and not all require rigid treatment, but the ones that require rigid treatment are four or five percent.

Q. By the way, what is the treatment of toxemia of pregnancy?

A. Well, if we are speaking of convulsions, we give magnesia sulphate and terminate the pregnancy quickly, as quickly as possible.

Q. And absent convulsions, if you get it in an early stage, what do you do?

A. Put them in bed rest and give them magnesia sulphate and proper diet; keep them quiet, and get a larger bed, so we don't have to terminate as soon as we have — in

other words, we try to get a baby up to 37 weeks, the total being 40 weeks; but in some instances, or most instances of true toxemia, it is a progressive thing, and you have to terminate the pregnancy early.

There is one other thing, the question of partial placenta previa and complete placenta previa. This is a condition in which the implantation of the ovum is in the lower segment of the uterus, and the afterbirth is adjacent to the opening of the cervix at the birth canal, and the complete placenta previa is where the afterbirth is actually over the lower opening of the cervix.

Now, this results — as the uterus enlarges and stretches and begins to pull, hemorrhaging will occur, and these can be very, very serious complications that require medical attention.

These symptoms don't occur very frequently in the middle trimester, but they can and do.

Q. Do they occur more frequently in the third trimester?

A. Very much more so.

Q. Will you tell us, in the third trimester of pregnancy, that is, the seventh, eighth, and ninth months, about the frequency of placenta previa?

A. It is not very high. I would say — I haven't read up on any recent figures on it — but I would say it is probably, partial and complete, run about 1 to 2 percent of all pregnancies. I am not sure of these figures at the present time.

Q. I understand they were accurate the last time you checked them?

A. Yes.

Q. Now, coming to the third trimester of a pregnancy, the seventh, eighth, and ninth months; what are

some of the complications of pregnancy during the third trimester?

A. Well, there is premature labor with a premature baby occurring spontaneously for reasons we don't know.

Again, there is the toxemia of pregnancy; that is, we referred to it in the second trimester, which is more acute in the third trimester, more serious; and again the placenta previa, and the complete and partials.

Q. Are there any others?

A. Well, there are all kinds of things at the time of the delivery.

Q. Now, we talked heretofore about the complications of pregnancy. I would now like to relate those complications of pregnancy to the environment in which the pregnant lady finds herself.

First of all, what is the effect upon the mobility of a pregnant lady in the third trimester of pregnancy caused by the gain of 15 to 20 pounds of weight with the change in her center of gravity? What effect does that have on her mobility?

A. Well, that reduces her ability considerably. Her whole center of gravity changes, and her shoulders are further back, and she is subject to more backaches, and due to the weight increase she is much more awkward and can't move around as quickly as she could before.

Q. What about frequency of urination?

A. Well, there is generally a pressing on the bladder. Now, this frequently occurs, not in the early part of pregnancy, but occurs in the last trimester, and they have to go to the bathroom quite frequently to urinate.

Q. What about, sir, the effect on appetite, if any?

A. Really, in a normal individual, their appetite and food consumption remains fairly much the same; although

they do have a tendency to eat a little more than before. They have a tendency to. It is very important that they have an adequate type of diet.

Q. What kind of a diet?

A. Well, we always stress a high protein and low salt diet for a pregnant woman. Many doctors will completely ban salty food whatsoever, so that these pregnant women should be on a low-salt diet. A high-salt diet we feel does have some influence on the toxemia and increases it.

Q. Now, Doctor, let's get back a bit from the environment to, not the physiological effects of pregnancy, but the psychological effects of pregnancy on a normal healthy lady. What effects, what — first, what emotional effects occur psychologically in a pregnant lady by reason of her pregnancy?

A. I will preface my answer on that by saying that every time a new OB patient comes in I say, "You are going to get worried, and if there is something you are worried about, call me. That is the reason we have a phone."

Q. What are these worries?

A. In the early months they are worried about the probability of a miscarriage. As the pregnancy goes along they are worried about difficulties in labor and abnormalities in the children.

Q. Are these perfectly normal worries and fears for a pregnant lady to have?

A. Yes; but they vary considerably in degree in individuals. Some girls are scarcely aware of the fact they are worrying, and others will be on the phone constantly with questions about it.

Q. Now, sir, what effect does the environment in which the pregnant lady finds herself have upon her fears and worries?

A. Well, I think I can give an example of that. I am frequently called up by a girl in the last three months saying, "Is it all right for me to fly down to Florida?"

Well, if she is two weeks from term, I would say, "No," and if she is just six months along, then it would not do harm, and she could go; but they are worried about a change in environment, such as flying or traveling by car and things like that.

Now, of course, if there is evidence of complications, then you have to alter your advice in things like that.

Q. What about an environment in which the pregnant lady might be in fear of physical assault?

A. Again, I would feel that this would increase her worries considerably. I don't think there is any — we do not have any evidence as yet that worry would induce a premature labor. We know that a physical thing can; but in our knowledge that we are getting to now of the relationship of the hypothalamus and the pituitary gland, it is possible mental reactions could bring on premature labor.

Q. What effect if any would such fears have upon the pregnant lady in the performance of her duties in that atmosphere where she was afraid of an assault?

A. Well, I think she would not be able to fulfill her duties as well as if she were not pregnant.

Q. Now, sir, let's talk about actual physical trauma and its effect upon — withdraw that.

What is the effect if any of sudden, violent, physical exertion, upon a pregnant lady?

A. This could cause what we call a premature separation of the placenta, in which the afterbirth, which is attached to the inner wall of the womb, becomes separated, and you get bleeding.

Q. Is that called a placenta previa?

A. No. A placenta previa is only in the position of it.

Q. A premature separation of the placenta can be caused by a violent, physical exertion?

A. Yes, and not too violent either, oftentimes.

Q. Not too violent?

A. Not too violent.

Q. Well, what sort of a violent, physical exertion causes a premature separation?

A. A blow on the abdomen, a punch in the belly.

Q. A shoving or pushing?

A. Yes; any violent exerting motion, a change of position.

Q. And this would be with the person who theretofore had had a perfectly normal pregnancy?

A. Presumably, yes.

Q. Now, sir, what about a blow to the breast during the third trimester of a pregnancy?

A. Well, this could, depending on the degree of blow, cause hemorrhage in the breast, or it would cause difficulty in nursing the baby. Later on it might even lead to a breast abscess.

Q. By the way, I am not sure I asked you, but going back to the complications of pregnancy, absent any environmental problem, are there some Rh problems involved in the last months of a pregnancy?

A. Yes.

Q. What are those?

A. The Rh factor is a blood factor, and if the mother is Rh negative and the husband is Rh positive, she can develop antibodies in her circulatory system which go through the placenta to the baby, and when the baby is born it becomes jaundiced and can die as a result of this.

Now, we are able to measure these antibodies throughout pregnancy and we can anticipate trouble com-

ing up on this, and of course we can transfuse these babies and save many of them; but an Rh factor is a complication of the latter part of pregnancy, and oftentimes warrants terminating a pregnancy at 37 weeks instead of 40 weeks through cesarean section.

Q. And when you terminate the pregnancy you save the baby?

A. You are hoping to save the baby.

Q. Now, Doctor, I am going to ask your opinion—what we lawyers call a hypothetical question.

First, I will ask you if you have an opinion, and then if you answer that you have one, then I will ask you what your opinion is.

I ask you to assume—by the way, let me withdraw that and get to one other question.

You spoke of the worry that a pregnant lady might have, one of the three worries that she might have, and you spoke of the worry about death and losing the baby, and the worry about giving birth to a child with birth defects.

A. Yes.

Q. These are perfectly normal worries?

A. Yes.

Q. Now, if the environment in which a pregnant lady is placed places her in frequent contact and association with children who do have mental and emotional problems, although not directly related to a retardation, but mental and emotional problems of children unable to adapt themselves to their environment, what effect if any would that particular environment have on that normal fear?

A. I think it would create that fear to a certain degree in almost every individual, but again the degree would vary.

Q. Now, coming back to this expert's opinion; I ask you to assume that the City of Cleveland School Board has a regulation called "Maternity Leave," and that regulation provides, in essence, that any married teacher who becomes pregnant and desires to return to the employ of the Board at a future date may be granted a maternity leave of absence, effective not less than five months before the expected date of the normal birth of the child and continuing until not earlier than the beginning of the regular school semester which follows the child's age of three months.

A. Yes.

Q. Do I make that regulation clear to you?

A. Yes.

Q. I ask you for your opinion, Doctor—I ask you if you have an opinion, Doctor, based upon your experience and your expertise as to whether or not that regulation is a reasonable and, in your opinion, a good regulation in the interests of the pregnant school teacher in the City of Cleveland School System; having in mind the further fact, which I ask you to assume as true, that during the last school year a total of 256 assaults occurred upon teachers in the Cleveland Public School System.

And I ask you further to assume as a fact that so far during the current school year a total of 140 assaults upon teachers had occurred in the Cleveland Public School System.

Asking you to assume that those facts are true, Doctor, I ask you if you have an opinion as to the wisdom and reasonableness of the maternity leave policy of the Cleveland Board of Education. First, do you have an opinion?

A. Yes.

Q. What is your opinion?

A. I think it is a very reasonable rule.

Q. Will you tell the Court why, sir.

A. I think the reason I would say this is—now, the exact time of four months of course is a little flexible—but certainly as pregnancy goes along the chance of injury and the increased worries I feel would increase the complications of pregnancy to a certain extent.

MR. CLARKE: Thank you, sir. That is all I have.

THE COURT: Do you wish to take a recess?

MR. KATZ: Whatever is your pleasure.

THE COURT: Proceed.

CROSS-EXAMINATION OF DR. WILLIAM C. WEIR

By Mr. Katz:

Q. Doctor, you testified that at the height of your practice you were delivering 10 or 20 babies a month?

A. That is correct.

Q. I assume you were seeing 10 or 20 new pregnant women each month?

A. That is correct.

Q. Did you at that time suggest to these women, Doctor, that they take to their beds right away?

A. No.

Q. Did you suggest to them that they take to their beds at the end of the fourth month?

A. No.

Q. At the end of the fifth month?

A. No.

Q. Sixth?

A. No.

Q. Seventh?

A. No.

Q. Eighth?

A. No—now, wait. I can qualify that by saying, “Providing it was a normal pregnancy.”

Q. Providing it was a normal pregnancy. What percentage of the pregnancies are normal, in your opinion, Doctor?

A. The total fetal loss in a normal population is about anywhere between—it varies in the economic groups—between 13 and 20 percent, 130 to 200 per one thousand live births. In other words, 15 to 20 percent fetal losses.

Q. So you would say 80 to 85 percent are normal pregnancies?

A. I am speaking of fetal loss. Now, with some of these other complications you don’t always get a fetal loss; so there probably is a higher percent of complications.

Q. Would you say 70 percent of all pregnancies are normal—or 60 percent?

A. I would say probably between 60 and 70 percent can be considered entirely normal.

Q. Would I be correct, Doctor, in assuming 60 to 70 percent of your patients, during the height of your career, were undergoing normal pregnancies?

A. I would say that is correct.

Q. To your knowledge were any of them working women?

A. Yes.

Q. To your knowledge were any of them school teachers?

A. Yes.

Q. To your knowledge, sir, were any of them school teachers in the inner-city schools of Cleveland?

A. A few; a very few.

Q. Did you advise these women to stop working?

A. No. I didn't advise them to stop, because they generally stopped themselves.

Q. Would you advise them to stop working?

A. Under the present circumstances I think it would probably be a wise idea to tell them they are taking increased chances.

Q. Would you advise them to stay out of all crowds, Dr. Wier?

A. I think it depends on the type of crowd you are in.

Q. What type of restrictions do you impose upon your patients, or did you impose upon your patients when you were engaged in the general practice of obstetrics and gynecology?

A. I generally allowed my patients to lead a relatively normal life, dependent on how much they felt that they could do.

Q. In other words, Doctor, you believe that so long as it was normal, a normal pregnancy, they could make their own determinations within reason?

A. Generally speaking, yes.

Q. Did you permit your patients to swim?

A. Yes.

Q. Engage in reasonable physical activities?

A. Yes.

Q. Doctor, would you say that the bulk of the answers to the questions that Mr. Clarke asked you on direct examination had to do with the abnormal pregnancy?

MR. CLARKE: Objection.

THE COURT: Sustained.

Q. I will rephrase the question.

Doctor, is a spontaneous abortion an abnormal pregnancy?

A. Well, we don't really know, because we don't know the exact causes of them. I suggested two possibilities. Both of those would be considered abnormal.

Q. You testified on direct examination, Doctor, that a spontaneous abortion was basically due to an organic weakness in the egg; is that correct?

A. I said it was due to either a defect in the fertilized egg, or an abnormal implantation in the wall of the uterus.

Q. Then it would not be connected to the activity of the mother?

A. I didn't say that either. This could be, and there are instances of violent trauma or accidents, automobile accidents, causing a miscarriage.

Q. Would a violent trauma cause the misplacing?

A. No. It does not cause a misplacing, but it could cause the placenta to become separated and cause a miscarriage.

Q. Doctor, you said nausea was common during the first trimester?

A. That is correct.

Q. Is it common to the point that, in your opinion, all pregnant women suffer from nausea during the first trimester?

A. No.

Q. What percentage do not?

A. It varies considerably. Sometimes nausea is scarcely noticeable, and they just don't try eating certain types of foods; and others are actively vomiting; and I would say that nausea is present in well over 50 percent, probably close to three-quarters of the pregnancies, but in general

it is not a serious complication, and it disappears at the end of the three months, but it can be a serious thing.

Q. In the second trimester, Doctor, what percent of the pregnancies terminate in spontaneous labor?

A. In spontaneous labor?

Q. Yes, sir.

A. I would say that it is a relatively small percentage. The middle trimester is considered by far the safest time. The—

Q. The middle trimester—

THE COURT: Wait a minute. Let him finish his answer.

A. (Continuing)—the middle trimester, from three months to six months long. That would be 12 weeks to 28 weeks of gestation.

Q. What is the occasion of toxemia in pregnancy, Doctor?

A. As I testified before—

MR. CLARKE. Can you speak a little louder? I don't believe his Honor can hear you. I know that I can't.

A. Yes. As I said, it is roughly about 10 percent of the patients that we see at MacDonald House that have some evidence of either early or more severe symptoms of toxemia.

Q. And you testified, Doctor, didn't you, that that can generally be foreseen?

A. It can in general be anticipated, but sometimes it comes on very suddenly. In other words, we will see a patient in the office where everything is normal, and three days later she is curled up with a severe headache, and we see her, and her blood pressure has skyrocketed, and she is in trouble.

Q. What causes a toxemic pregnancy?

A. Nobody knows.

Q. If it can be foreseen through the rise of blood pressure or presence of albumin in the sugar—no—I mean, in the urine. Excuse me—

A. Not the sugar.

Q. You can prescribe to that woman, can't you, Doctor?

A. Again, it depends on the degree that it is being manifest. In other words, if her blood sugar has shot up extremely high, you hospitalize her; and if it has gone up a little, you tell her to go home and stay in bed, and you see her in a week.

Q. But you wouldn't make a general prediction for all pregnant women?

A. There are various degrees of all of these things.

Q. So, Doctor, what we are getting at, isn't it, is that each pregnancy is an individual thing and must be treated individually and separately?

THE COURT: Please ask questions. Don't tell him what you are getting at.

Q. I will rephrase it.

Doctor, would you say that each pregnancy is an individual matter?

A. Yes.

Q. And would you say that each expectant mother is a very special person who should be prescribed for individually?

A. My personal feelings are, yes.

Q. What is the occurrence, the normal occurrence of placenta previa?

A. I think I testified to that already, actually, didn't I, Charlie, at 2 or 3 percent?

Q. I believe you said 1 to 2 percent.

A. 1 to 2 percent, I believe, yes.

Q. That is not very common, is it, Doctor?

MR. CLARKE: Yes, he did.

A. No; but it can be a very serious complication of a pregnancy. It can result in the death of the mother.

Q. Can that be foreseen?

A. Not totally, no. It can come on very suddenly, with no previous signs or symptoms. It comes on as a sudden, severe hemorrhage.

Q. How do you prevent it, Doctor?

A. You can't. You have to treat it when it occurs. There is no possible prevention of it.

Q. You don't tell all of your patients to stay in bed in case it occurs?

A. No, of course not.

Q. You testified, Doctor, as to the premature separation of the placenta?

A. Correct.

Q. —which I believe you testified to was caused by physical exertion; is that correct, sir?

A. That is one of the causes of it. It can happen spontaneously, too.

Q. Could a woman who is caring for children in her home, and is pregnant, suffer from a premature separation of the placenta?

A. Of course she can. Anyone can.

Q. Doctor, you also testified to the psychological effects of pregnancy. Does the mental health of the mother affect the pregnancy?

A. Again, in general, we do not feel that this is necessarily true; however, some of the newer evidence, as I

previously testified, in regard to this hypothalamus and pituitary gland, can alter some of the hormonal balances and probably put someone into a premature labor. This is all very new experimental work, and we don't know the answers yet; but it is perfectly possible.

Q. In your opinion, Doctor, if the expectant mother is happy and content, will that contribute to her well-being and the success of her pregnancy?

A. It wouldn't stop her from complications that occur during pregnancy. The existence of these are probably on a physical basis. She would certainly be an easier patient to take care of in general, but it is not going to alter the complications that can arise.

Q. But you testified, didn't you, Doctor, that her fears may affect the well-being of her pregnancy?

A. They may. I didn't say they do.

Q. Would the converse be true; if she weren't happy, it may affect the well-being of her pregnancy?

A. I would say we don't know enough about these new experimental areas to say if the converse would be true of that.

Q. Doctor, you testified that your most current specialty is fertility problems; is that true?

A. That is correct.

Q. Wouldn't you say that your views on the care of pregnant women have been shaped by your concern for infertility or infertile women?

A. I will answer that very directly to you in this way:

That if a woman has an infertility problem and becomes pregnant, the fetal loss in her population is considerably higher than the average group, and I am concerned about them.

Q. So then the previously infertile woman requires special care?

A. She requires closer observation, but we do know that the fetal loss rates are considerably higher.

Q. Doctor, what is your connection with the University Hospitals?

A. I am on the visiting staff of the University Hospitals, MacDonald House, OB and GYN, Department of Reproductive Biology.

Q. Is it not true, Doctor, that the maternity leave policy at the University Hospitals provides for leave at the end of the seventh or eighth month in the discretion of the nurses?

A. I am not aware of that regulation.

Q. Would you say, Doctor, that a nurse might be subject to the same stresses and strains as a school teacher?

A. Not necessarily so. I think a school teacher who is dealing with so many young individuals at one time is probably under more of a strain than the nurses.

Q. Would you suggest, Doctor, that a nurse is on her feet any less time than a school teacher?

A. I am not a nurse, and I am not a school teacher, so I don't know that I could really answer that question.

Q. You certainly have worked with nurses, Doctor, haven't you?

A. Yes.

Q. Doctor, I beg your indulgence. I would like to go over one area with you again.

I think you testified on direct examination — I am sorry, Doctor, let me rephrase that.

How would you advise a working woman who is pregnant as to her continued employment?

A. I would first inquire what type of employment she was on — doing. If it involved physical activities, and in excess of what I would consider normal or potentially in

excess, I would advise her probably that she should stop working at an earlier time than somebody who was sitting entirely at a desk job.

Q. Well —

A. And —

MR. CLARKE: Excuse me, have you finished?

MR. KATZ: I am sorry.

A. (Continuing) What I was going to say is that I have had patients that worked as secretaries throughout pregnancy, and I have seen nurses that worked in the hospital going to term and practically going from the nurse's station up to the delivery room.

Now, usually the hospitals — in this situation, would put these nurses in the type of job on the hospital floor in which their physical activities were considerably reduced, and not require them to do as much; but in general I have never said to a patient, "You can't do this or that." I can only advise them.

Q. Doctor, have you treated patients who have worked through or worked beyond the end of the fourth month of their pregnancy?

A. Of course I have — many.

Q. Have you always disapproved of this?

A. No.

Q. Have you told the women to stop working?

A. I have on occasion suggested it would be a wiser thing if they discontinued work.

Q. But not always?

A. Oh, no.

MR. KATZ: No further questions, your Honor.

MR. CLARKE: No further questions.

THE COURT: That is all, Doctor. Thank you.

MR. KATZ: Your Honor, we have no further witnesses today, and we would like to resume tomorrow with the Court's leave.

THE COURT: Is there anything else you can put on, Mr. Clarke?

MR. CLARKE: The only thing is, your Honor, we had some further stipulations about the Teacher's Handbook. I think that the agreement of counsel is that we will offer the Teacher's Handbook in evidence, either as a joint exhibit, or Plaintiff's exhibit, with the understanding that everything in here is relevant; and counsel for both sides would hope to call the Court's attention to those portions of the handbook which are relevant.

MR. KATZ: A joint exhibit would be fine.

MR. CLARKE: That is agreeable. All right. Let's mark it at this time.

The only other thing we can do, your Honor, and if you wish to continue, I would be glad to read into evidence the deposition of Dr. Mark Schinnerer, the former Superintendent of Schools in the City of Cleveland, and the person who originated this rule.

THE COURT: How long would it take?

MR. CLARKE: Well, it will take more than five minutes. My guess is — this is just a guess — it is a 33-page deposition, sir.

THE COURT: It will take more than a minute a page?

MR. CLARKE: Yes, sir.

THE COURT: Well then, what else is left of the lawsuit?

MR. KATZ: Your Honor, —

THE COURT: Are you finished otherwise?

MR. KATZ: No. We have four more witnesses, one who would be taken by deposition at 4:10 this afternoon, because of her inability to make it here today at an earlier time.

THE COURT: Will you use up two more hours?

MR. KATZ: We should be through presenting our evidence by the noon hour tomorrow morning, your Honor.

THE COURT: How long will you take, Mr. Clarke?

MR. CLARKE: In addition to this deposition, we may have one or two very short witnesses. I really have to beg your Honor's indulgence. I am not quite sure.

THE COURT: What you are saying then is you would be able to finish by the end of tomorrow?

MR. CLARKE: Yes.

THE COURT: Then we get down to the question of argument, or however you are going to handle it. All right. We will take our adjournment, Mr. Rogers, until 10:00 o'clock tomorrow morning.

(Thereupon Joint Exhibit 1 was marked for identification by the Clerk.)

(Thereupon the court was adjourned.)

APRIL 20, 1971; 10:00 O'CLOCK A.M.

MR. KATZ: Your Honor, if it please the Court, we would request permission to conclude the testimony

of the witnesses before reading the deposition into the record.

THE COURT: Certainly.

MR. KATZ: The plaintiffs call Dr. Jane Kessler.

DR. JANE KESSLER, having been called as a witness on behalf of the plaintiffs, after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF DR. JANE KESSLER

By Mr. Katz:

Q. Dr. Kessler, state your full name and address, please.

A. Jane W. Kessler, 2697 Edgehill Road, Cleveland Heights, Ohio.

Q. What is your occupation, Dr. Kessler?

A. Professor of Psychology at Case-Western Reserve University, specializing in child psychology.

Q. How long have you been a professor at Case-Western Reserve University?

A. 13 years.

Q. Have you had any other pertinent previous work?

A. Yes. I worked as Chief Psychologist at the University Hospitals in Cleveland prior to my present employment or position.

Q. Are you currently associated with the Mental Development Clinic?

A. Yes. I am Director of the Mental Development Center at Case-Western Reserve.

Q. Tell the Court, please, Dr. Kessler, what the Mental Development Center is?

A. It is an inter-disciplinary department of the university with pediatrics, social workers, special education, speech, and psychologists, working with children who have learning disabilities or who are mentally retarded, both for diagnosis and continued treatment, working with their families, and in some instances, setting up special programs.

Q. Would you tell the Court about your formal education, Dr. Kessler.

A. It has been a long time ago. I got my Bachelor's degree at the University of Michigan, 1940, and my Master's degree at Columbia, 1941, and my Ph.D. in child psychology in 1951, at Western Reserve University.

Q. Have you served in the United States Military?

A. Yes. Between getting my Master's degree and coming back to work in 1946, I was in the hospital corps as a Lieutenant in the Naval Reserve.

Q. Are you a member of any professional organizations, Dr. Kessler?

A. Yes.

Q. Would you tell the Court what those organizations are.

A. Well, I am certified by the Ohio Psychological Association, by the American Board of Examiners and Professional Psychologists. I am a member of the American Psychological Association, the American Association on Mental Deficiencies, and the American Ortho-Psychiatric Association, and the American Association on Child Psychoanalysis, and the Council for Exceptional Children, and the National Association for the Education of Young Children.

Q. Have you had any offices in these organizations?

A. I am past president of the Ohio Psychological Association, and currently I am the National Chairman of

the Children and Youth Issues Council of the American Ortho-Psychiatric Association.

Q. What is your specialty, Dr. Kessler?

A. Child Psychology.

Q. Are you Board certified in child psychology?

A. I was certified by the American Board of Examiners in Professional Psychology, which is actually parallel to the Board certification in a medical specialty.

Q. Have you written any articles in child psychology?

A. Yes.

Q. Would you tell the Court, please, where a few of these articles were published?

A. Well, I think there are about eight articles in the Parent Teacher magazine. I have been credited with four chapters to a textbook, and have written various articles in educational journals and psychiatric journals, and I have written a textbook entitled, "Psychopathology of Childhood."

Q. When?

A. Published in 1966.

Q. Has it been widely adopted throughout the country?

A. It is now in its tenth printing.

Q. Did you tell us what your present academic rank is?

A. Professor.

MR. CLARKE: What is the name of the textbook?

THE WITNESS: Psychopathology of Childhood.

Q. Would you describe the experiences you have had in your professional capacity dealing with children?

A. Well, I used to work in the University Hospitals,

mainly with emotionally disturbed children, diagnosis and treatment.

When I accepted the post as Director of the Mental Development Center, I became more involved with children who had learning disabilities, particularly children who are mentally retarded.

Q. What age groups have you worked with?

A. From birth to about 19.

Q. In addition to working with children who are mentally retarded, have you also worked with children who are considered normal?

A. Yes; but they would have some sort of problem, of course; but they—by that, you mean normal in intelligence—definitely, yes.

Q. Yes. That is what I meant.

A. Yes.

Q. Have you worked with inner-city children?

A. Yes. Worked and—I am now working as a consultant to various Head Start programs.

Q. In your professional work, Dr. Kessler, have you become aware of the attitudes and reactions of children?

A. Yes.

Q. In your professional work have you become familiar with the educational processes of children?

A. Yes, very much involved with the education of children.

Q. And Dr. Kessler, have you become familiar with the problems of maintaining discipline in the classroom?

A. Yes, on an individual basis, and also on a general basis.

Of course, many children who have individual problems are referred to the Mental Development Center, and we try to make diagnoses and recommendations for

them, but also about two years ago I chaired a series of seminars for teachers mainly in the City of Cleveland schools to the problem of violence in the schools.

Q. Do you have an opinion with respect to the attitudes and reactions of children to pregnancy?

A. This varies, of course, with their ages.

THE COURT: The question is, do you have an opinion?

THE WITNESS: Yes.

Q. Would you tell the Court what that opinion is.

A. They are very much interested. It is a matter of very vital concern to them. Even very young children are observant and curious about it, and want to know about it.

Q. In your opinion, Doctor, is this a natural curiosity?

A. Yes.

Q. Do you have an opinion, Doctor, with respect to the reaction of the children to pregnancies?

A. Yes.

Q. Do you have an opinion, Doctor, as to whether the reaction of children to pregnancies in a classroom would cause disruption?

THE COURT: Wait a minute. You are putting a leading question.

MR. CLARKE: I would have objected, but I didn't have a chance.

THE COURT: Well, I didn't object, but you didn't object very fast.

MR. CLARKE: I didn't have a chance. I am sorry.

THE COURT: The question is stricken.

Q. Doctor, do you have an opinion as to how children would react to a pregnant teacher?

MR. CLARKE: Objection.

THE COURT: Sustained.

Q. Do you have an opinion, Doctor, whether the presence in the classroom of a pregnant teacher would have any effect upon the children?

MR. CLARKE: Objection.

THE COURT: Sustained.

Q. Doctor, do you have an opinion as to whether there is any effect upon students from different stimuli within the classroom?

MR. CLARKE: Objection.

THE COURT: Sustained.

Q. Doctor, are you familiar with the reactions of children in a classroom?

MR. CLARKE: I object to that, too.

THE COURT: Well, she already expressed some —so I will sustain the objection.

Q. Doctor, what was your position at the University Hospitals?

A. Chief Psychologist.

Q. In that capacity as Chief Psychologist did you become familiar with the maternity leave policy for nurses at the hospital?

A. No.

Q. Dr. Kessler, you are a wife and mother of one child, are you not?

A. Yes.

Q. Did you continue working during your pregnancy?

A. Yes.

Q. How long prior to the delivery of your child did you stop working?

A. I stopped working about two weeks before my child was born.

MR. KATZ: No further questions. You may cross-examine.

CROSS-EXAMINATION OF DR. JANE KESSLER

By Mr. Clarke:

Q. Doctor, to what do you attribute the current wave of violence in the school system today, among children?

A. We spent a long time on that subject, and no, I couldn't give one single factor.

Q. You have no explanation, but you know it exists? You know of the incidence of violence in the school systems throughout the United States, not just the inner-city schools, and markedly increased?

A. Yes. One factor is undoubtedly television.

Q. But whatever the reason, do you know of any other factors?

A. Discontent.

Q. Television and discontent?

A. Yes.

Q. So that today in the school systems of the United States the incidence of violence—and by “violence” that includes both attacks of students on one another and attacks of students on teachers—is increasing?

A. Yes.

Q. Isn't it fair to say that the classroom today is a more dangerous place for the teacher to be than it was five years ago?

A. I don't know the dates.

Q. Well, 10 years ago then?

A. Yes.

MR. CLARKE: I think that is all. Thank you.

MR. KATZ: Just a couple of questions.

MR. CLARKE: Just a moment, please.

(After an interval.)

MR. CLARKE: That is all I have. Thank you.

REDIRECT EXAMINATION OF DR. JANE KESSLER

By Mr. Katz:

Q. Dr. Kessler, you just testified on cross-examination that in your opinion the classroom is a more dangerous place to be than it used to. In your opinion is the classroom a more dangerous place to be than a shopping center?

THE COURT: The objection is sustained.

MR. KATZ: No further questions, your Honor.

THE COURT: You are excused, ma'am.

MR. KATZ: At this time, your Honor, the plaintiffs would call Kathryn East.

KATHRYN S. EAST, called as a witness on behalf of the plaintiff, after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF KATHRYN S. EAST

By Mr. Katz:

Q. Miss East, please state your full name and address.

A. Kathryn S. East, 4212 North 32nd Street, Arlington, Virginia.

Q. Tell the Court your occupation?

A. Executive Secretary of the Citizens Advisory Council on the Status of Women and the Interdepartmental Committee on the Status of Women. I am on the payroll of the Labor Department.

Q. Mrs. East, please tell the Court your educational background.

A. I have a degree in education from Marshall University in Huntington, West Virginia, an AB degree; and I have 18 hours of law—but I don't think that is pertinent to this.

Q. How were you employed prior to becoming Executive Secretary of the Citizens Council?

A. I was Executive Secretary of the Federal Employment Committee of the President's Commission on the Status of Women. That Commission was appointed by President Kennedy in December, 1961, and made a report in October, 1963.

Q. Did you have any other pertinent previous employment?

A. Yes, sir, I think so. I was in public personnel work in the Civil Service Commission for 23 years prior to that time. Most of my experience was in general staff work. I studied subjects that were of interest to the Commissioners and prepared staff position papers for them, and in that connection also prepared executive orders for the President's signature, drafts of legislation, and testimony for the Commissioners.

Q. Thank you.

A. — and regulations to govern public personnel in the Federal Service.

Q. Fine. Thank you.

Would you tell the Court what your duties as Executive Secretary to the Citizens Council on the Status of Women are.

A. I am the Chief Executive Officer for both groups, and as such I arrange for the meetings and plan their agenda and prepare their minutes, do staff papers or arrange to have staff papers done, on the subject that they are interested in.

Q. Mrs. East, have you ever testified before in a court of law?

A. Yes, sir.

Q. In what capacity?

A. In the same capacity. I testified yesterday in Richmond in a case very similar to this.

Q. What was that capacity?

A. As an expert on the status of women.

Q. Would you tell the Court, please, Mrs. East, what the Citizens Council on the Status of Women is.

A. Well, it is a group of private citizens appointed by the President to advise the President, to advise Federal agencies, and to advise state governments, and private groups, including employers, on actions that would enhance the status of women.

Q. Who are the members of the Council?

A. You want the names of the members?

Q. Please.

THE COURT: I wish you would get down to your lawsuit.

MR. KATZ: I am trying to qualify the witness. Well, we will dispense with the reading of the names.

Q. How does the Council arrive at its policy statement, Mrs. East?

A. Various ways. We make studies based on what the Council is interested in and wants to study at the moment. I do some, and in some cases I get expert details from other parties of the Government, the Justice Department, the Health, Education and Welfare Department, and the Defense Department.

Q. Mrs. East, has the Citizens Council on the Status of Women had the occasion to consider the maternity leave policy?

A. Yes. We did very recently on two different meetings.

Q. Has the Council taken an official position?

A. Yes, sir. We adopted a policy—

MR. CLARKE: Objection.

THE COURT: Sustained and stricken. Let's get down to this lawsuit.

MR. KATZ: Your Honor, I would respectfully suggest that the position taken by other agencies—

THE COURT: You might, but let's get down to this lawsuit, sir.

Q. In your position as Executive Secretary to the Council, Mrs. East, have you had occasion to learn of the maternity leave policies of various Government agencies?

MR. CLARKE: Objection.

THE COURT: Sustained.

Q. In your position as Executive Secretary of the Council on the Status of Women, Mrs. East, have you become familiar with Executive Order No. 11246, as amended, with respect to employment discrimination by

contractors and subcontractors of the United States Government?

A. Yes, I have had.

MR. CLARKE: Objection.

THE COURT: Well, she got it in pretty fast, but it is stricken. The objection is sustained, and you wait for questions, please, Miss.

MR. KATZ: No further questions, your Honor. You may cross-examine.

MR. CLARKE: No questions, your Honor.

THE COURT: You are excused, madam.

MR. KATZ: At this time, your Honor, we request the Court's permission to read into the record the deposition taken yesterday of Dr. Sarah Marcus.

THE COURT: Do you all have copies?

MR. CLARKE: Yes, your Honor. Thank you.

THE COURT: O.K. Proceed.

MISS AGIN: "Dr. Sarah Marcus" —

THE COURT: I think you better sit up here, so I can be sure to hear you. It is hard to hear you from the table. Your voice isn't very loud.

MISS AGIN: I have a cold.

THE COURT: That is all right. I just want to make sure I am getting it. I am the only audience you have.

143a

**IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

JO CAROL LA FLEUR,
Plaintiff,

vs.

CLEVELAND BOARD OF
EDUCATION, et. al.,
Defendants.

Civil Action
No. C 71-292

ANN ELIZABETH NELSON,
Plaintiff,

vs.

CLEVELAND BOARD OF
EDUCATION, et. al.,
Defendants.

Civil Action
No. C 71-333

Deposition of DR. SARAH MARCUS, a witness of lawful age, taken in the above captioned matters pending in the District Court of the United States for the Northern District of Ohio, Eastern Division, by agreement of counsel, before Roy Thompson, Jr., a Notary Public within and for the State of Ohio, and an Official Court Reporter for the District Court of the United States for the Northern District of Ohio, Eastern Division; in the courtroom of the Honorable James C. Connell, Room 202, U. S. Court House, Cleveland, Ohio, on April 19, 1971, at 4:15 o'clock p.m.

APPEARANCES:

On behalf of the Plaintiffs:

Carol S. Agin, Esq.

Louis Katz, Esq.

On behalf of the Defendants:

Charles F. Clarke, Esq.

Arthur A. Kola, Esq.

George W. Pring, Esq.

DR. SARAH MARCUS, of lawful age, called as a witness by the plaintiffs, being by me first duly sworn, as hereinafter certified, deposed and said as follows:

DIRECT EXAMINATION OF DR. SARAH MARCUS

MISS AGIN: Mr. Clarke, I would like to know if you would agree to waive the signature?

MR. CLARKE: Yes.

MISS AGIN: Would you, Dr. Marcus, be willing to waive the signature? This would mean that you wouldn't have to read this record as soon as it was finished in order to sign it.

THE WITNESS: Well, I don't know.

MR. CLARKE: May I say, Dr. Marcus, that both Miss Agin and I will attest to the accuracy of the transcription as it will be done by this court reporter, and that is why I am willing to waive the signing of the deposition.

THE WITNESS: Well, all right.

MISS AGIN: All right. Thank you.

By Miss Agin:

Q. Dr. Marcus, will you please tell the Court your address.

A. 25 Prospect, or 211 Republic Building.

Q. And your occupation?

A. Physician and surgeon.

Q. Now, I would like to go into your education. Where did you go to college?

A. I obtained my A.B. degree at Western Reserve University — Case-Western Reserve now; and my medical degree at the University of Michigan.

Q. And when did you begin practice, Dr. Marcus?

A. In 1923.

Q. And since that time have you had any appointment to hospital staffs or associations?

A. Oh, well, I was associated with Mount Sinai 10 years in the Gynecology Department, and then I transferred. I still have privileges there, but I am more active at Women's Hospital, Women's General Hospital; and I am Chief of OB and GYN at that hospital, and have been for 17 years.

Q. Were you Vice-President of that hospital, the Board of that hospital?

A. I was on the Board of Trustees, and I was Vice-President since 1927, I think it was. Anyway, I was Vice-President for about 26 years, and President for 14 years; and I still am President, but I am hoping to get off the job.

Q. And were you active in Planned Parenthood of Cleveland?

A. I have been very active. I was one of the original doctors connected with Planned Parenthood when it first originated in Cleveland.

Q. What organizations have you been in, medical organizations?

A. Of course I am a member of the Academy of Medicine, Cleveland; and the Ohio State, and all the other necessary organizations connected with my profession.

Q. Did you help found a medical society in Cleveland?

A. I helped to stimulate the formation of the Women's Medical Society in Cleveland.

Q. Have you been a lecturer or teacher?

A. Well, in the early days I lectured on behalf of Planned Parenthood to church groups and school groups on education, sex education.

Q. Do you have any publications?

A. I have had some in the Women's National Medical Journal.

MISS AGIN: Mr. Clarke, I have with me a Xerox copy of an article about Dr. Marcus which appeared in the Plain Dealer, April 8th, a Thursday, which she gave to us. Are you willing that we introduce it?

THE WITNESS: That was in relationship to an announcement of my asking for me to be relieved of my presidency on the Board of Trustees, because I had served for 14 years, and I wanted to be relieved.

Q. Would you say that article is an accurate description of your history?

A. I thought it was very fair, and everybody else said it was a very honest summary of what the hospital gave them, and what the reporter asked, the questions that she asked me.

MR. CLARKE: I take it you want to offer this into evidence?

MISS AGIN: Yes; with your approval.

MR. CLARKE: Well, why don't you have it marked for identification.

(Thereupon Marcus Deposition; Plaintiffs' Exhibit No. 1, was marked for identification by the Notary Public.)

Q. Dr Marcus, would you look over this and see if it is a copy of the article which was in the Plain Dealer.

A. Yes. This is a Xerox copy, yes. There was another piece on it here (indicating), where they had me taking care of a patient, but this is a copy of the published remarks.

Q. O.K.

MR. CLARKE: Let the record show I object to those portions of the article which contain the comments by persons other than the doctor. I have no objection as to the recital of the doctor's qualifications and experiences therein.

Q. Dr. Marcus, you have been in practice since about 1923. About how many babies would you say you have delivered since 1923?

A. My father always wanted to know that, and I never kept track; but many, many, I can assure you.

Q. Would you say 1,000?

A. Yes; of course.

Q. Now, have you treated any pregnant women who worked during their pregnancy?

A. Who worked?

Q. Yes.

A. Yes; I have treated a lot of pregnant women who worked during their pregnancy.

Q. Have any of these women asked your opinion as to whether they were able to continue to work during their pregnancy?

MR. CLARKE: Show an objection to the form of the question. Why don't you just ask her if she has an opinion on that subject.

Q. Do you have an opinion as to whether pregnant women should work during their pregnancy?

A. Yes; I have an opinion that it doesn't hold true across the board for every woman, but I think it should be individualized, and that women who are pregnant can work under the supervision of their physician up until just before they are ready to go into the hospital for delivery. I did.

Q. Are you familiar with the duties of a teacher?

A. Well, I think — I never taught, except Sunday school, but I have quite a number of school teachers who are patients of mine, and patients who have been pregnant.

Q. How did you advise the school teacher patients of yours?

A. How is that?

Q. How did you advise the school teacher patients of yours?

A. Well —

MR. CLARKE: Show an objection, the same objection; but you may answer. Go ahead.

MR. CLARKE: I object to the, "How did you advise the school teacher patients of yours?"

THE COURT: Sustained as to her advice.

Q. What is your opinion when you are a school teacher?

A. Well, they come to me, and I am a very strict doctor, and I demand they come in every month, and after the seventh month they come every two weeks, and the

last month of pregnancy they come every week, or more if necessary; and I give them advice, depending on the individual patient. It is not across the board. Some can work right to the end, and some can't, depending on their condition, which varies, of course.

Q. Have you advised healthy pregnant school teachers that they can work?

A. If they so desire, yes.

Q. Are you familiar with physical activities like climbing stairs and standing?

A. Well, I do know of course they have to climb stairs, and I tell them to be careful and not run up the stairs all at one time; but there is no harm in climbing stairs. It is good activity. As a matter of fact, it keeps their muscles in good trim, and it is good for them.

Q. Do you advocate physical activity during pregnancy?

A. I sure do, unless they have complications. When I say this, I want you to remember it is not for everybody, but if there is complications, and I know about them, and they were under my supervision, I might limit this, depending on the patient's condition.

Q. Are you familiar with general housewives' chores?

A. I should say I am. I have to do some of it myself. These are hard days when you can't get hold of good housekeepers, and those chores are good active exercise; and I am sure pregnant women have to do it. They have to lift if there are other young children; and they have to do a lot of things that are very difficult physical exertion, and they get by with it very well.

Q. Would you say that the housewife's chores present as great a stress or exercise in pregnancy as teaching?

MR. CLARKE: Objection; but you may answer.

Q. I will rephrase the question. I will withdraw that question.

Do you know what the chores of teaching are?

A. Well, I wouldn't be able to say, one, two, three, four, and five; that they have this to do, but I take it for granted they are on their feet considerable, and they can sit down. There is no restrictions about them sitting down, and it is mostly a mental job rather than a physical one, as far as I know.

Q. In your opinion do the chores of housekeeping present more of a stress than the chores of teaching in pregnancy?

MR. CLARKE: Objection. You may answer.

MR. CLARKE: There is an objection to the question, your Honor.

THE COURT: She may answer.

A. Let's not put it that way. I would rather say that the chores of housework are strenuous physically, perhaps not as strenuous mentally and emotionally, but there is nothing that the teacher does as a teacher that is any more strenuous than what a pregnant mother does with housework; and her attentions with the other children, if she has any, are also strenuous.

Q. Are you familiar with the chores or routine of nursing?

A. You mean the nursing profession?

Q. Yes; the nursing profession.

A. Oh, yes. I am intimately associated with it. It is around me constantly every day, and it requires a great deal of physical exertion and also mental, but particularly physical. If a patient falls out of bed, that nurse has got to get up quickly and lift her, regardless of whether she is

pregnant or not, because she is on duty; and so it has hazards greater than teaching, I would imagine.

Q. Would you permit a patient of yours who was pregnant to continue nursing, continue the occupation of being a nurse?

A. Well, that again should be individualized. We have nurses around our hospital who work, and if they are equal to the job, and the doctor approves of it, she may stay on.

Q. How long may a nurse stay on in your hospital?

A. Well, I don't think up until this time we have any strict rules about it, but they usually quit about the seventh month; but I think they can quit sooner, depending on the doctor. If the doctor says you can't work, you can't work; but we have no across-the-board decisions to make on that matter.

Q. Have you ever given birth to children?

A. Yes, I had two pregnancies and delivered them and worked right up to the time of the delivery, almost.

Q. You answered my next three questions.

Well, let me ask you, at the time that you were pregnant, what were your duties as a doctor?

A. My duties as a doctor were exactly the same duties that I perform today.

Q. And could you elaborate?

A. Well, I get up early and go to the office, and I see patients and examine them and talk to them, and I get in and out of a car and drive all over, and go to the hospital.

I do the usual things that a doctor has to do; and when I was pregnant, with the exception of the early part of one pregnancy, where the doctor said, "No," I was too badly nauseated, and I stayed home for a few weeks; but again it was under the direction of your doc-

tor. If the doctor says work, then she works; and my doctor didn't object to my working, so I worked.

Q. What are your hours of work?

A. Pardon?

Q. What are your daily hours of work?

A. My hours of work?

Q. Or what were they when you were pregnant?

A. Well, you know I can't make that specific, because a doctor's time is a very irregular thing. Some days I work very hard and long hours, and sometimes I only put in five or six hours a day. It depends on the work load you are presented with in your job.

Q. Were you ever called for night duty?

A. Yes, during my pregnancy, and I took them.

Q. In emergencies?

A. Yes; in emergencies.

Q. Did you ever work on the weekends when you were pregnant?

A. I surely did. Doctors don't have weekends in my field.

Q. Is morning sickness a physical condition of pregnancy?

A. Yes. It is considered so.

Q. Now, what months of pregnancy is nausea most prevalent?

A. The early months of pregnancy, the first two months or three months.

Q. Is it common after the fourth month?

A. I wouldn't say common, but it could occur.

Q. When you have a patient with any type of problem pregnancy, do you advise the patient to take precautions?

A. Well, I wouldn't be a good obstetrician if I didn't. I have to keep them informed, and I am the type of physician who tries to teach and keep my patients informed, because I spend a lot of time teaching them about themselves. That was part of my job in Planned Parenthood; to teach them about themselves, and warn them what might happen and when to call me, and I give them little slips of paper stating that if there is anything, a spotting of this or that, call your doctor; and they are alerted to what to expect in the way of emergency.

In the way of — not necessarily an emergency — but something that is not quite regular, why, I might say, "Well, you better stay home."

Q. And if you had a pregnant patient with a toxic pregnancy, what would you do?

A. She won't work until I get it under control.

Q. How about with placenta previa?

A. That is an accident of pregnancy and a serious emergency, and she will go to the hospital pronto, and she will know it, because I have already informed her of the possibility of such an emergency.

Q. Would you say that the great bulk of pregnancies are normal pregnancies?

MR. CLARKE: Objection. *Dr*

MR. CLARKE: I will withdraw that objection.

A. I am sure glad they are; yes.

Q. What precautions do you advise a woman to take who is experiencing a normal pregnancy?

A. Well, the usual precautions that I start out telling them about is what to expect in a pregnancy, so she is

informed about what to expect; and from there on to stop worrying about herself and go ahead and lead a normal life.

I don't like to keep them worrying about themselves, because this creates emotional problems. I consider pregnancy a normal situation in the majority of patients.

MISS AGIN: Thank you, Dr. Marcus. No further questions.

MR. CLARKE: Just a moment, Doctor.

CROSS-EXAMINATION OF DR. SARAH MARCUS

By Mr. Clarke:

Q. How many beds are there at Women's Hospital?

A. I think we have 180 beds.

Q. I take it from this newspaper article about you that a great bulk of your work in the last few years has been in an executive capacity as President of the Women's Hospital Association?

A. That is right. That is just a part of my work.

Q. I understand that, but this article is about your retirement as President of the Women's Hospital Association. That is what brought the article about?

A. That is right.

Q. And you were Vice-President of the Women's Hospital Association for 26 years before becoming President 14 years ago; is that right?

A. That is correct. The appointment — well, go ahead.

Q. You also have been Chairman of the Executive Committee and the Board of Trustees of the Women's Hospital Association?

A. That is part of it. The Executive Committee of the Board of Trustees consists of the President and other

members, so that is normal; and the Executive Committee of the staff is an appointment by the staff.

My staff duties and my Board duties are entirely different, you know.

Q. I see; so as President of the Women's Hospital Association, were those staff duties?

A. No.

Q. What were those?

A. The President of the Association, did you say?

Q. Yes. What were the duties?

A. Those duties had to do with the financing of the hospital and administrative duties, running of the hospital, and that sort of thing.

Q. You have been in charge of that for 14 years?

A. Yes.

Q. And as Chairman of the Executive Committee and the Board of Trustees?

A. That is part of that.

Q. That was part of those responsibilities?

A. Yes.

Q. And in addition to that you had an office in the Republic Building where you examined individual patients?

A. Yes; and the date I was appointed as Chief of OB and GYN, the appointment comes from a recommendation by the staff.

Q. I understand.

Now, as I understand it, your testimony here today is that whether or not a woman should continue after she becomes pregnant depends upon the condition of the individual patient?

A. That is right.

Q. In some instances you recommend continued working, and in some instances you recommend that she stop?

A. I think so.

Q. And is this judgment essentially a medical opinion?

A. That is exactly right.

Q. And that medical opinion, the nature of the work that a pregnant woman performs, can have something to do with your medical opinion as to how long she should continue working, can it not?

A. I would put it the other way around; not the nature of the work, but the nature of the patient.

Q. Would you recommend a female patient that was working at farm labor continue working up until the term?

A. They do it.

Q. I ask you if you as a doctor today would recommend that?

A. If the patient was in good health, I would recommend it.

Q. You mean she could work out on the farm every day up until the term?

A. That is right.

Q. That is the way it used to be in the old days?

A. That is right.

Q. What was the infant mortality rate in the old days?

A. Well, it was higher, but it had nothing to do with dropping babies on the farm. That patient that was on the farm probably wasn't getting good medical care.

Q. That is right.

A. I base my idea on the patient. I individualize the patient.

Q. What about the mortality of the mothers when the babies were dropped in the field?

A. That depended on lack of care. I am talking about good medical care.

Q. So your testimony is today you have no objection on the grounds of the physical activities that a woman continue to work, who was a farm hand, right up until term?

A. If she is under my care, and under a doctor's care; yes.

Q. That is all right with you?

A. Yes; if she is equal to it physically.

Q. Well, you are the one to make that determination?

A. That is right. I do.

Q. What about working as a steel worker, where she worked on the construction of new buildings, climbing up on beams for a new steel building?

A. Well, that might be another story. She would present herself with the possibility of an accident which I wouldn't approve of.

Q. Why is that so?

A. Because it is hazardous, even for men.

Q. In what respect?

A. They slip in the construction business. I watched them through the window falling off the Terminal Tower one time, and when they got to the bottom, they weren't alive. Construction is a dangerous business. I wouldn't expect my pregnant mother to be a construction worker.

Q. You mean whether she was pregnant or not?

A. That is right.

Q. So you wouldn't recommend any woman working in construction work?

A. Well, particularly so if she is pregnant.

Q. Why is that? What difference does it make?

A. If she falls she will have a miscarriage and hurt herself, and the baby too.

Q. Would it make any difference if she is in the eighth term and gained 20 pounds, and changed her center of gravity?

A. If she gained 20 pounds she hasn't been under care.

Q. That is your opinion? 20 pounds is too much to gain?

A. Well, we allow them up to 18 or 20, but not too much more, but if she is careful, unless she is suffering from hypertension or kidney infection or some other reason, she shouldn't suffer from dizziness.

Q. Well, how about the effect of the fetus, the growing fetus, in changing the woman's center of gravity? Doesn't that occur?

A. The fetus changes the woman's center of gravity?

Q. Yes.

A. I am not cognizant of any.

Q. You don't think it does?

A. Well, my patients have never complained about it to me, if it does.

Q. As far as you are concerned the woman's center of gravity doesn't change during the eighth or ninth month of pregnancy?

A. No. She wears a garment, and she adjusts gradually to that change.

Q. How about the frequency of urination during the eighth or ninth month of pregnancy?

A. Unless there is some infection in the bladder, there is nothing to disturb her in that respect, and if she has, she has to be checked by a doctor and cared for.

Q. So it is your testimony here today that in the normal pregnancy there is no increase in the frequency of urination during the last month of pregnancy? Is that your testimony?

A. Well, not a disturbing point. My patients haven't complained about it to a disturbing point, unless they have an infected bladder.

Q. I am talking about the normal pregnancy. Is there or is there not an increase in the incidence of urination for the last month of pregnancy in the normal pregnant woman?

A. I can only answer by saying they have never complained to me that that was a disturbing factor in their condition.

Q. So that is something that never attracted your attention in all your years of practice; is that right?

A. Not unless there was infection.

Q. All right. I am not talking about infection. How about strenuous physical exercise during the third trimester of a pregnancy?

A. You mean the last three months?

Q. Yes. Don't you call it a "trimester" — during the last trimester of the pregnancy. I am talking about the last trimester of the pregnancy.

A. Strenuous, physical exertion?

Q. Strenuous, sudden, physical exertion.

A. I wouldn't expect my patients to do strenuous, sudden — and I am emphasizing the "sudden" — physical exertion.

Q. Suppose a patient were exposed to strenuous, sudden, physical exertion during the last three months of a pregnancy. What effect if any would that have on the pregnancy?

A. Well, in a normal pregnancy the chances are that it will have no effect, but I wouldn't want to say it never would. That wouldn't be right.

Q. Actually, while a pregnant woman in the last trimester of her pregnancy — withdraw that.

A pregnant woman in the last trimester of the pregnancy is not as agile at maneuvering around as a non-pregnant woman, is she?

A. I can't generalize that. Some who are obese certainly won't be as agile as a patient who is not obese. That can't be generalized.

Q. Come on now, Doctor; do you mean to tell me that — withdraw that.

Isn't it a fact that every single pregnant woman, eight to nine months pregnant, carrying a fetus that is a normal growth, and who has gained normally from 15 to 18 pounds, is not as agile as a non-pregnant woman?

A. Well, I think that is stretching a point.

Q. I asked you for your opinion, professionally. Do you have an opinion? Do you have an answer?

A. I would say perhaps she is not as agile.

Q. So your answer is that she is not as agile; is that correct?

A. Yes.

Q. Now, you have testified that there is nothing that a teacher does as a teacher that is any more strenuous than the housewife does; is that right?

A. In my opinion.

Q. That is your opinion, based upon your knowledge of teaching and your knowledge of being a housewife?

A. Yes.

Q. Have you ever taught as a teacher other than Sunday School?

A. No.

Q. Excluding Sunday School?

A. No.

Q. Have you been in any of the junior or senior, or for that matter, elementary schools in the City of Cleveland within the last three or four years?

A. No. My son has been out of school, so I haven't been connected with it in the last three or four years.

I used to go to school and see what was going on when he was going to school.

Q. How old is your son?

A. 40.

Q. Now, as far as pregnant nurses are concerned, the pregnant nurse you are talking about works in a hospital environment, doesn't she?

A. That is what I am talking about, because that is all I know about.

Q. You are talking about the nurse who has got the doctor just down at the end of the hall?

A. Pardon?

Q. The pregnant nurse on duty in the hospital.

A. That is right.

Q. Who has available, if she needs it, all the facilities of that hospital?

A. That is right.

MR. CLARKE: Excuse me just a minute.

THE WITNESS: Surely.

MR. CLARKE: Doctor, I guess that is all. Thank you very much.

MR. KATZ: One moment, please.

REDIRECT EXAMINATION OF DR. SARAH MARCUS

By Miss Agin:

Q. Dr. Marcus, in your hospital are pregnant nurses given lighter responsibilities and duties?

A. Well, I am not the nursing supervisor, and I am afraid I can't answer that question.

Q. Are you in active practice now?

A. Am I in active practice—too active.

Q. And why were you late today?

A. Pardon?

Q. Why were you late today?

A. Well, I had an emergency operation.

Q. So that—

A. You mean late in coming here?

Q. Yes.

A. I didn't get back to the office. I was called away on an emergency.

MISS AGIN: That is all. Thank you, Doctor.

MR. CLARKE: Doctor, just one question.

RECROSS-EXAMINATION OF DR. SARAH MARCUS

By Mr. Clarke:

Q. What kind of an emergency operation was it?

A. Well, it was an emergency operation.

Q. Did it involve a pregnancy?

A. Yes, it did.

Q. Would you tell the Court what it was, what the operation today was, bearing in mind the physician-patient privilege. I am not asking you to disclose anything other than just tell us in general the nature of the emergency.

A. Post partum; a post delivery hemorrhage.

Q. After delivery?

A. Yes.

Q. I see.

How long after delivery?

A. Two or three hours after delivery.

Q. Those are one of the complications?

A. Yes.

Q. Those are one of the complications of pregnancy, a post partum hemorrhage, two or three hours after delivery while the patient was still under medical care?

A. Yes.

MR. CLARKE: That is all. Thank you.

MR. KATZ: We have no further questions.

(Thereupon at 4:55 p.m., the deposition of Dr. Sarah Marcus came to a close.)

CERTIFICATE

THE STATE OF OHIO,)
) ss:
COUNTY OF CUYAHOGA)

I, Roy Thompson, Jr., an Official Court Reporter for the District Court of the United States, for the Northern District of Ohio, Eastern Division, and a Notary Public within and for the State of Ohio, duly commissioned and qualified, do hereby certify that the within named witness, DR. SARAH MARCUS, was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid; that the testimony then given by her was reduced by me by stenotypy in the presence of said witness, subsequently transcribed into typewriting under my direction, and that the foregoing is a true and correct transcript of the testimony so given by her as aforesaid; and that the witness, DR. SARAH MARCUS, expressly waived signature to the deposition.

I do further certify that this deposition was taken at the time and place as specified in the foregoing caption.

I do further certify that I am not a relative, counsel, or attorney of either party, or otherwise interested in the outcome of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Cleveland, Ohio, this 19th day of April, 1971.

Signed, Roy Thompson, Jr., Notary Public In and For the State of Ohio, and Official Court Reporter for the U. S. District Court.

"My commission expires March 13, 1973."

MR. KATZ: Your Honor, at this time the plaintiff would request a short recess.

THE COURT: All right. Five-minute recess.
(Recess taken.)

THE COURT: Please be seated. Proceed.

MR. KATZ: Your Honor, the plaintiffs rest.

MR. CLARKE: At this time, your Honor, the defendant would like to read into the record the deposition of Dr. Mark Schinnerer.

THE COURT: Go right ahead. Do I have our copy, Barney?

THE CLERK: Yes, you have it right there.

THE COURT: O.K.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Jo Carol La Fleur,

Plaintiff,

vs.

Cleveland Board of Education, et al.,

Defendants.

No C71-292

Ann Elizabeth Nelson,

Plaintiff,

vs.

Cleveland Board of Education, et al.,

Defendants.

No. C71-333

Deposition of DR. MARK C. SCHINNERER, taken before Dennis W. Hagestrom, a Certified Shorthand Reporter and Notary Public within and for the State of Ohio, at the offices of Squire, Sanders & Dempsey, 1800 Union Commerce Building, Cleveland, Ohio, at 11:30 A.M., Tuesday, April 13, 1971, pursuant to notice and stipulations of counsel, on behalf of the defendants in this cause.

APPEARANCES:

Miss Carol S. Agin and
Mr. Lewis R. Katz,

On behalf of the Plaintiff;

Squire, Sanders & Dempsey, by
Mr. Charles F. Clarke and
Mr. Arthur A. Kola,

On behalf of the Defendants.

DR. MARK C. SCHINNERER, of lawful age,
called by the defendants for the purpose of direct examina-
tion, as provided by the Rules of Civil Procedure, being
by me first duly sworn, as hereinafter certified, deposed
and said as follows:

DIRECT EXAMINATION OF DR. MARK SCHINNERER

By Mr. Clarke:

MR. CLARKE: Let the record show that this
deposition is being taken pursuant to notice and by agree-
ment of counsel, and that the deposition is being taken
by the defendants to be offered in evidence at the hearing
on both the case of Jo Carol La Fleur and the case of Ann
Elizabeth Nelson, which hearing has been set for April
19, 1971.

Let the record further show that all requirements
as to the manner and method of taking the deposition, the
notice thereof and the signature thereof are waived. Is
that agreeable?

MISS AGIN: Yes.

MR. CLARKE: Put it in both cases.

Q. Dr. Schinnerer, these actions are pending in Fed-
eral Court. Counsel for both sides have agreed to waive

the requirement of the signature of the witness. However, in Federal Court the witness himself has the right to waive the signature. That is to say, both Miss Agin and I have confidence in the accuracy of the transcription by Mr. Hagestrom, and we are willing to waive your signature. Are you also willing to waive your signature?

A. Yes.

Q. Thank you, sir. Will you tell the Court your name, please, sir?

A. Mark C. Schinnerer.

Q. Where do you live, sir?

A. 1489 Bunts Road, Lakewood.

Q. What is your present profession or occupation?

A. I am unemployed.

Q. How old are you?

A. I am retired.

Q. I see. How old are you, sir?

A. Well, I will be 72 in June.

Q. Sir, will you tell us something about your formal education, high school, college, and professional school, if any?

A. Well, after high school I went to Indiana State University for a Bachelor's Degree, then to Columbia University for a Master's Degree, and I then finally got my Ph.D. from Western Reserve University.

Q. What was your field?

A. Educational administration.

Q. Do you have any honorary degrees, doctor?

A. I have a Doctor of Laws' Degree from Oberlin College.

Q. Will you tell us something now about your professional career after the completion of your formal education?

A. Well, my professional career was sort of interspersed with my formal education.

After the A.B. I went to Rockville, Indiana, as a coach and high school principal. That is odd that I become high school principal right out of college, but they wanted me to coach and they had to make me principal so they could afford me.

I stayed there two years, and three of us decided to shake the dust of Indiana off our feet and went to New York to seek our fortune. I went into Education at Columbia University and one of the boys went into Law at Columbia and the third one, who was the most successful of the three of us, went into business and became head of the Clark Estates in New York. I think his principal claim to fame is that he founded the Baseball Hall of Fame at Cooperstown.

Q. Is that so.

A. Following the year in New York, where I received a Master's from Columbia, I came to Cleveland in 1923 and became the assistant principal of the then Thomas Boys School, later the Thomas A. Edison school for boys. I was there four years, and they took me to headquarters and put me in the Research Department as an assistant for one year. After that I became principal of Kennard Junior High School on East 46th Street.

From there I went to Thomas Jefferson Junior High School on West 46th Street.

Following that I became Director of Adult Education in the Cleveland Public Schools.

And I became Assistant Superintendent of Schools, in charge of the junior high schools.

In 1946 I became the Deputy Superintendent of Schools, in charge of elementary education, and in 1947 I became Superintendent.

Voluntarily retired in 1961, after 14 years in the superintendency. I had three years to go on a contract when I asked to be released.

Q. You asked to be released yourself?

A. Yes, I did. There was no lynching party out at the time.

Q. Now, sir, subsequent to your retirement from the Cleveland Public Schools after almost 40 years of service, what, if anything, did you then do?

A. I ran for the Legislature.

Q. Were you elected?

A. Yes.

Q. How many terms did you serve in the Ohio Legislature?

A. Three terms.

Q. Did you have anything to do with education while you served in the Ohio Legislature?

A. Oh, a great deal. I sponsored the bill, basically, which created Cleveland State University. I was the Chairman of the Education Committee the last term I was there.

Q. In addition to your work in the Legislature since your retirement, have you done any work in a consulting capacity regarding education?

A. Yes.

Q. Will you tell us what that is?

A. Commissioner Allen, of the Board of Regents in New York State, asked me to go into New York City and

make a report on that school system. There had been some scandals. Asked me to make a report on the school system for the Regents and the Legislature, to tell them what ought to be done; which I did.

Subsequently I became a special consultant to the U. S. Office of Education, special reference to urban education, and in the process I set up a national conference of large city representatives on education. Large city superintendents.

Subsequent to that the Los Angeles Board of Education employed me as a special consultant to make a complete study of their salary schedules and to recommend schedules and salaries on every position in the school system; which I did.

Q. You mentioned the conference of large city schools' superintendents. Did you ever serve in any capacity with that?

A. When I retired I was Chairman of the conference of the large city school superintendents.

Q. That is for the entire United States?

A. Yes. That conference met twice a year, three days each time, in various cities in the United States, where we discussed our mutual problems.

Q. Have you received any particular awards of merit from school authorities?

A. Well, I suppose the most significant one that I received is the distinguished service award of the American Association of School Administrators. That is the large national organization of school administrators. Mostly school superintendents.

Q. Sir, I have advised you that this case is set for hearing on April 19, 1971, and you have advised me that you would be out of the City at that time. Will you tell the Court where you will be?

A. Yes. I regret that there is this conflict. About three months ago—I am a part of the Martha Holden Jennings Foundation. I set up a state conference on elementary and secondary education and that conference will be held next Monday and Tuesday, the 19th and 20th, in Columbus. There will probably be a thousand or twelve hundred people there, and I just think I should be there since I started it.

Q. You feel that it is essential that you be there, and for that reason will be unable to be in court?

A. That is so.

Q. Very well, sir. During your tenure as Superintendent of the Cleveland City School District, can you tell me approximately how many students were enrolled under you, both at the beginning and at the end? Just an approximation.

A. Well, there were around 100,000 when I started, and we grew up to about 135, - or 140,000 in the 14 years I was Superintendent.

Q. Can you give me any estimate as to the number of teachers, approximately, under your jurisdiction at that time or during that period of time?

A. Around 4,000.

Q. About an average annual teacher membership of about 4,000?

A. Well, it grew as the population, the school population grew, and I think at the end it was a little over 4,000. Those are classroom teachers, you understand.

Q. Yes, I understand, sir. I direct your attention to the Teacher's Handbook of the Cleveland Public School, and on page 20 there appears a section entitled "Maternity Leave."

Will you explain to the Court what, if any, familiarity you have with that particular provision? That

is, do you know where it came from and anything about its history?

A. Yes. It came from me.

Q. Will you explain?

A. I recommended this to the Board of Education at that time. Now, this is not the exact language. It has been changed since then.

Q. I understand that you say at that time. Of what time are you speaking?

A. Early fifties.

Q. Prior to some time in the early fifties had there been any rule on maternity leave?

A. None.

Q. Did there come a time then when you recommended a rule on maternity leave to the Board of Education?

A. Right.

Q. Was the rule substantially similar to that rule as it now appears?

A. Substantially. There have been a few changes in it. I will give you an example.

Q. Yes.

A. Would you like that?

Q. Please, sir.

A. My original rule, that the Board approved, said that the teacher could return from the leave-of-absence at the beginning of a semester following the age of six months of the child. I see that that has been changed to three months.

Q. Other than that are there any significant changes in the rule, as you recall?

A. I don't think there are any significant changes.

Q. Sir, will you tell the Court the circumstances leading up to your making the recommendation that this maternity leave rule be adopted? What brought it about?

A. Well, we had some very embarrassing situations develop where women, who were pregnant, would stay too long in the classroom, and the result was that those teachers were subjected to humiliations, indignities on the part of pupils, generally, who giggled about it, and it was embarrassing to the teacher and it was also disruptive of the classroom.

Q. You said staying too long. Would you explain what you mean?

A. Too close to the birth of the child.

Q. Too close to the end of the term?

A. Yes.

Q. What effect, if any, did that have on the teacher's physical appearance, in so far as the children were concerned?

A. Well, pregnant women develop the sign of pregnancy.

Q. What effect did that have on the children?

A. Well, this is what they were giggling about and this is what they were making snide remarks about.

Q. How did the fact that—

A. I think it was embarrassing to the teacher and a form of cruelty.

Q. How did the fact that the snide remarks and cruelties were taking place come to your attention, if you recall?

A. Oh, through reports from members of the staff.

Q. Was there one instance or more than one instance of this?

A. Many, but I wouldn't be able to tell you how many.

Q. I'm not asking you to document them, but were there many incidents?

A. Oh, yes. You see, the teaching staff at that time was about 75 percent female, and so you would have this incident that the ages—they were young. Most of them were within child-bearing range, and this was just a natural result of marriage.

Q. Do I understand you to say then that these reports came to you of many instances and it was these reports that made up your mind to suggest this rule to the Board of Education?

A. Yes. We thought that we would have to do something to prevent the continuance of the condition that was existent.

Q. Sir, you have stated to the Court your experience and qualifications in the field of education and in the field of school administration and my question to you now is I am going to ask you if you have an opinion, as a qualified expert in the field of education, as to the present validity and desirability or lack of it of the maternity leave rule as it presently appears in this pamphlet? First of all, do you have an opinion?

A. Yes, I have.

Q. What is your opinion, sir?

A. I think it is a good rule.

Q. Will you tell the Court why you think it is a good rule?

A. Because it protects the teachers and it protects the continuity of the classroom program from the things that—

Q. In your opinion—excuse me, sir. Did you finish?

A. —that happen. Things that happen.

Q. In your opinion does this rule prevent disruptions in the educational process?

A. Does this rule prevent—

Q. Prevent disruption?

A. Yes, I think so.

Q. After the enactment of the rule, were there any protests from anyone that you recall?

A. Been a long time, but I remember none that came to my attention.

Q. Were there any teachers' unions at that time?

A. Well, we had a teachers' union and we had an education association. One was labor affiliated. One was O.E.A. affiliated.

Q. Will you identify them by name, please, sir?

A. The Cleveland Federation of Teachers, that was the union affiliate, and the Cleveland Education Association was the O.E.A. affiliate.

Q. Did either of those associations protest the maternity leave rule at any time, to your knowledge?

A. Not to my knowledge. It didn't come to my attention certainly.

Q. Would it have come to your attention had formal protests been made?

A. Formal protests, yes.

Q. Did any complaints come from the Parent-Teachers Association?

A. Not to my knowledge.

Q. When this was submitted to the Board of Education, was there a written submission or was it just an oral submission, if you recall?

A. Oh, no. The rule was presented with the recommendation for its adoption.

Q. Was your recommendation in writing, as you recall?

A. I presume it became a part of the record of the proceedings of the Board of Education.

Q. Do you have any records of your own?

A. I don't have any, no.

Q. Do you recall whether the action of the Board of Education at that time was unanimous or not?

A. As I recall, it was unanimous.

Q. Was that action taken at a public meeting?

A. Oh, yes.

Q. To your recollection was a full detail given by you to the Board as to the reasons for—

A. I gave them the reasons for requiring the adoption of the rule.

Q. And are those the reasons substantially?

A. Those are the reasons I have given you today.

Q. Thank you, sir.

MR. CLARKE: Bear with me for a moment, please.

Q. Is there any particular reason why four months was chosen as what might be described as the cut-off date in this maternity leave rule?

A. Well, it was about a halfway point and it was at that point when the physical appearance begins to change.

MR. CLARKE: Your witness.

MR. KATZ: Thank you.

CROSS-EXAMINATION OF DR. MARK C. SCHINNERER

By Mr. Katz:

Q. Dr. Schinnerer, you answered Mr. Clarke's question that the basic reason for the rule was to prevent the continuance of the condition, and I think you meant the condition of the indignities to teachers. Would you want to elaborate upon that at all?

A. Well, pointing, giggling, laughing, remarks, plus the consequent interruption, interference with the classroom activity as a result.

Q. Did the teachers complain about this condition to you?

A. I'm not sure I understand the question.

Q. Were the complaints and reports of the interruptions and the giggling and the snide remarks communicated to you from teachers at any time during—

A. No. From the principals.

Q. Would you ever make an exception during this period, during the period that you were Superintendent of the Schools? Were there any exceptions made, to your knowledge, to permit a teacher to continue?

A. No. The only exceptions that would occur would be those in which the teacher would not report the fact. We were not aware of the fact because she didn't let us know.

Q. At the time that you were Superintendent of Schools were there any pregnant students or students whom you knew or your principals knew to be pregnant in the school system?

A. Yes, sir.

Q. And were they permitted to continue as long as they could?

A. No.

Q. What was the rule with regard to pregnant students?

A. We had no written rule. We thought it was a matter of propriety, and it was discussed with the parents and the child. The girl would then be withdrawn until a subsequent date, and, if returned, returned probably to another school. Not the same one.

Q. What was the incidence of pregnancy amongst students in those days? Any idea?

A. I don't remember.

Q. Was it a common thing?

A. In some schools more common than in others. I was in a school as a principal—and I am probably volun-

teering information here that you don't need. I was principal of a school in which there was a much higher incidence of this than in the subsequent school where I was principal.

Q. Were these students the subject of snide remarks indignities and humiliation?

A. Occasionally, but really the greatest difficulty was the students, with girl fights.

MR. CLARKE: You say the greatest difficulty with the student was —

A. Was girl fights, where the student who was pregnant would get into a fight with another girl. Not often could we determine the base, but I thought — I always concluded that there must have been some jealousies present because of maybe the boy who was in the background.

Q. I see. At the time that you were Superintendent and this policy was adopted, was there any rule with regards to maternity leave for teachers who had been employed for a period of less than five years or two years or one year?

A. Didn't make any difference.

Q. The maternity leave was applicable to all teachers?

A. Yes.

Q. At the time you recommended this to the Board, I gather you had already been active in national associations. Did you make an effort to find out how other cities were handling this problem?

A. I don't think we made any such investigation.

Q. In your capacity as consultant to the New York State Board of Regents, which I believe is subsequent to your leaving the superintendency—

A. Yes.

Q. And you did a report to the New York City schools. Did you at that time become familiar with the policy they might have with respect to pregnancy amongst the teachers?

A. No.

Q. Did you have occasion to learn of that when you were serving as consultant to the Los Angeles school system?

A. No.

Q. Did you have any occasion to look into this matter or to learn of this matter with respect to other school systems when you were with the U. S. Office of Education?

A. No.

Q. Prior to the adoption of this rule in, you said, the early fifties, there was no maternity leave policy whatsoever?

A. We granted maternity leave, but we didn't have a rule that said they had to do it.

Q. I see. And did your office ever suggest to a teacher that she leave prior to the adoption of this rule?

A. Indeed so.

Q. And what was the reaction of the teachers?

A. Sometimes yes and sometimes no.

Q. I see.

A. If it had always been yes, you see, you wouldn't have needed a rule.

Q. Right. Prior to the adoption of this rule did you have a nonmaternity general leave-of-absence rule?

A. Yes.

Q. Am I not correct that that rule provides an opportunity for the School Board to grant the leave even without the request of the teacher?

A. That would mean the granting of an involuntary leave?

Q. That's right.

A. I know of no instance of that kind.

Q. I see.

A. There might have been an exception or so in the matter of military leave, a leave-of-absence for military service.

Q. But that would normally be requested?

A. He would have been so busy getting out that he wouldn't have time or wouldn't think of asking for a leave. The result was we would just automatically put him on leave.

Q. With respect to teachers with other physical conditions or physical disabilities, how would you handle leaves for them?

A. Well, would you be specific? Give me an instance.

Q. If in your opinion a teacher, for instance, suffering from a heart condition was unable to perform satisfactorily in the classroom, how would you have handled that matter?

A. Personal contact with some staff member doing it or talking to the teacher's doctor, seeing what he would recommend, and then in case he recommended, we would ask him to advise his patient to save his own life.

Q. And if the teacher was unwilling to act and yet his performance in the classroom continued to suffer, would you then take action?

A. We would have to take action in that case.

Q. What type of action would you have taken?

A. Well, it would probably have been — never had a case. Probably would have been a dismissal action.

Q. And you never had occasion to do that with a pregnant teacher either prior to the adoption of this rule?

A. I'm trying to make a connection.

Q. I am sorry. Prior to the adoption of this rule, if a teacher refused to withdraw and seek a leave-of-absence, what action would you take?

A. I never had a case where I had to take action.

Q. O.K. Are you suggesting by that, sir, that the teachers generally acceded to your suggestion?

A. I am suggesting that some did and some didn't. I never had a case where the child was born in the classroom. It became awfully close a few times.

Q. In the case of the teacher who was unwilling to voluntarily seek this leave, would you then just permit her to continue teaching?

A. We had really no alternative unless we could get the doctor to advise it. That's why I would have the rule adopted, to handle those who said, "No."

Q. You said earlier that one of the purposes of this rule was to prevent the disruption of the educational process. Prior to the adoption of this rule how would you prevent the disruption of the educational process in the face of a teacher's unwillingness to seek a leave-of-absence because of reasons of pregnancy?

A. There wasn't much we could do about it. That's why we had to do this.

MR. CLARKE: I take it by "do this," you mean adopt the rule?

THE WITNESS: Adopt the rule.

MR. CLARKE: Excuse me.

Q. You never prior to the adoption of this rule sought to dismiss a teacher who was pregnant because of the disruption of the educational process?

A. No, I didn't. I had one case whose name I don't remember, but she was — about every 15, 18 months she would have to take a leave-of-absence because she was going to have another baby. The babies were piling up and I thought there were a lot of little children who needed her more than we needed her, and I urged her to withdraw. As I remember it, she did. She was really a good teacher, able, attractive, but her interest was in rearing a family instead of teaching school.

Q. Dr. Schinnerer, in your opinion, did pregnancy always result in the disruption of the classroom?

A. I would have to qualify my answer by saying that it didn't always do it in the elementary level, but it was very nearly always at the secondary level that it did. Adolescents had a different point of view than the pre-adolescents.

Q. Were all pregnancies reported to your office?

A. No.

Q. Did you have a policy at that time for principals when they became aware that a teacher was pregnant, to report it to your office?

A. She would be reported to the assistant superintendent. See, the superintendent cannot handle all the detail. That's why he has a staff. Only the tough cases got to my desk.

Q. I see.

A. Those were the cases they couldn't handle at a lower level, and I never had an easy case. All the tough ones came to me.

Q. So then the rule was based upon those cases which came to your attention?

A. No. It was based upon advice and counsel of my associates too.

Q. Who was the assistant superintendent at that time, do you recall?

A. Well, there were four of them.

Q. Do you recall which one would have received the communication from the principals as to pregnancy?

A. Three of the four would.

Q. I see.

A. Because they were divided this way: One was in charge of elementary education. One was in charge of secondary education. One was in charge of special education. And the fourth one was in charge of what I would call research and development, curriculum and so forth.

Q. Is it possible for you to recall who the three were?

A. I think McCormick probably was the assistant superintendent for secondary schools, Levenson for elementary schools, Fintz for special schools, and Ritchie for research and development, curriculum. I may have slipped on one of them, but I don't remember names two days away now.

Q. Neither do I.

A. It's 19 years.

Q. Dr. Schinnerer, can you possibly recall back and describe to us some particular instances of disruption which led you to believe that this rule was wise and necessary?

A. I think that would be stretching my memory a bit too far.

Q. Would you consider a change in teachers in the middle of a semester or a term a disruption of the classroom?

A. Yes, indeed, and that is why I, in the rule, wrote in that the teacher could return at the beginning of a semester, after the six months age of the child, which has now been changed to the three months. I see, in this

rule. Now, I had a twofold reason for that. One was so that it wouldn't be a second break. A second class wouldn't have the disruption of changing teachers in the middle of the semester. And the other was that I am a strong believer that young children ought to have the mother there. I think much of the difficulties we have in this country come from the fact that parents have neglected, and it is very important that they be there for the love and tender care of the babies. If that is a lecture —

Q. That's fine. That's quite all right. How serious would be the disruption of changing teachers in the middle of a semester?

A. Well, it generally takes some time for the teacher to get acquainted with the youngsters. She wouldn't know what has happened in the curriculum to date except in a general way. And I think there would be a loss perhaps of two or three weeks in the continuity of the educational program.

This happens, certainly, when a teacher leaves any time or when a teacher dies or when a teacher goes into the military, is drafted into the military service, although I think they are getting more reasonable in doing it now at the end of a semester instead of half way.

Q. Do you happen to recall any difficulties in obtaining replacements, teachers in the middle of semesters?

A. Generally just fill in with a substitute. Those were the days of teacher shortages. It's a far cry from today when there are a hundred thousand teachers looking for jobs.

Q. In the case of extreme teacher shortage, would you ever have continued on a pregnant teacher who had reached the four-month period until a suitable replacement could be found?

A. No.

Q. Doctor, with your extensive experience in education and dealing with young people for over 40 years, I would consider you an expert on young people and changing attitudes of young people. What was the reaction of children in school in the forties, up until the adoption of this rule, to pregnancy? Do you have an opinion on that?

A. Well, the reaction was, in general, "See what's happened to her." It is a giggling piece. Children can be very cruel too. And I think it took a brave teacher to stay almost to the date of the birth, just as it took a brave teacher to face some of the discipline problems that are in the schools. It takes a brave teacher today to stay on the job in some of the schools in this system where assaults on teachers are now approaching 300 a year. That's why they refer to the pay as combat pay.

Q. Do you think that the attitude of young people towards pregnancy has changed in the subsequent twenty years?

A. I don't know.

Q. Do you think, in your opinion as an expert, that there could be any healthy benefits gained for children in the school system to see a married woman, who is pregnant, able to retain her position until the time she feels it is necessary to withdraw?

A. Would you restate the question?

(The last question was read by the Notary.)

A. I think not.

Q. Would you explain your answer?

A. Well, I just don't think it is a matter of producing a healthy environment. The fact that the woman is pregnant and goes ahead to teach, I don't think she probably would teach as well if she didn't have that natural thing. And I am glad that we still do have pregnant women in

this country. You may have too many, but we have some, should have some.

Q. Do you think that there is any difference in reaction on the part of children to a married pregnant teacher and to an unmarried pregnant student?

A. An unmarried pregnant student?

Q. Yes, sir.

A. It's difficult for me to put them in the same focus. I wouldn't be able to answer that question on the basis of difference of their point of view in looking at the two instances you have cited. There may be, but I don't know what it is.

Q. Did you ever consider the adoption of a rule similar to the teacher rule with respect to pregnancy amongst students?

A. No. I did consider it one time, the possibility of setting up a special class or a special area for all the pregnant — where all the pregnant girls would go and continue their education until it became too late. But then when I thought about that further, I thought that everybody would point to that school as the pregnant school, which I didn't think would be good for the kids' welfare.

Q. But subsequent to that, then, you never considered the adoption of a rule to exclude pregnant students who were showing?

A. No. We have the authority in law to suspend them.

Q. What was the practice during your period?

A. Suspending them.

Q. At what point in the pregnancy?

A. When it was obvious, apparent. And it is a strange thing. I am volunteering something now you may not want. You first noticed it in their attitude, in their behavior before you noticed it in their physical being.

Q. You are referring to students?

A. To the students.

Q. Would you want to elaborate, sir?

A. Well, I think I did a while ago when I referred to girl fights.

Q. Sir, are you familiar with the regulation of the Cleveland Board of Education which does not permit the school to suspend pregnant students at this time?

A. No, I am not.

Q. No such regulation was adopted during the period you were superintendent?

A. No.

MR. KATZ: I think that's all. Thank you.

REDIRECT EXAMINATION OF DR. MARK C. SCHINNERER

By Mr. Clarke:

Q. Dr. Schinnerer, I think you were asked on cross-examination if you recall any specific incidents prior to the adoption of this rule. Now may I attempt to refresh your recollection — or am I in error? When I talked to you before your deposition today, do I recall an incident involving children taking bets in class or is that — will you please tell me if that is an instance that you recall?

A. I recall the incident, a report, but I don't remember the case.

Q. Will you just tell us in general what it was?

A. Well, this thing was so far advanced —

Q. You mean the woman's pregnancy, the teacher's pregnancy was so far advanced?

A. That's right. It was reported that the children in the classroom, in the junior high school, were taking bets on whether the baby would be born in the classroom or in the hall.

Q. This was actually reported to you as an instance, but you don't recall the specific details or the teacher's name?

A. I wouldn't recall the case.

MR. CLARKE: Well, that is all I have.

MR. KATZ: I think that's all.

MR. CLARKE: Thank you very much, doctor. I appreciate your being here.

(Signature waived.)

CERTIFICATE

The State of Ohio,)
County of Cuyahoga.) ss:

I, Dennis W. Hagestrom, a Certified Shorthand Reporter and Notary Public within and for the State aforesaid, duly commissioned and qualified, authorized to administer oaths and to take and certify depositions, do hereby certify that the above-named DR. MARK C. SCHINNERER was by me, before the giving of his deposition, first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the deposition as above set forth was reduced to writing by me by means of stenotypy, and was later transcribed into typewriting under my direction; that this is a true record of the testimony given by the witness, and that the reading and signing of the deposition by the witness were expressly waived by the witness and by stipulation of counsel; that said deposition was taken on Tuesday, the 13th day of April, A.D. 1971, in the City of Cleveland, County of Cuyahoga, and State of Ohio, pursuant to notice and stipulations of counsel herein contained, and was completed without adjournment; that I am not a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, or financially interested in this action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office, at Cleveland, Ohio, this 14th day of April, A.D. 1971.

Signed, Dennis W. Hagestrom, Certified Shorthand Reporter and Notary Public, State of Ohio.
550 Engineers Building, Cleveland, Ohio
44114

My commission expires June 1, 1974.

JULIUS TANCZOS, JR., having been called as a witness on behalf of the defendants, after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF JULIUS TANCZOS, JR.

By Mr. Clarke:

Q. Give the Court your name, please.

A. Julius Tanczos, Jr.

Q. Spell your last name.

A. T-a-n-c-z-o-s.

Q. Where do you live, sir?

A. 4020 Eastway Road, South Euclid.

Q. You are a native of Cleveland, Mr. Tanczos?

A. Yes.

Q. Where were you born?

A. East 120th and Buckeye Road.

Q. Did you go to the Cleveland Public Schools?

A. Yes, I did.

Q. Will you tell the Court what schools you attended?

A. Harvey Rice Elementary, Moses Cleveland Junior High, and John Adams High School.

Q. Did there come a time when you graduated from John Adams High School?

A. Yes.

Q. What did you do then?

A. I went into the United States Navy.

Q. After service in the United States Navy what then did you do—by the way, how long were you in the Navy?

A. 13 months.

Q. After your Navy service, what did you do?

A. I attended Kent State University.

Q. Did you receive a degree?

A. Yes.

Q. Tell the Court what it was.

A. Bachelor of Science in Education, with a major in Science.

Q. Did you receive any other or further professional degrees?

A. Yes, sir. I attended Kent State University at the graduate school level and received a Master of Education in Educational Administration, in 1957.

Q. Then what did you do?

A. I sought employment, and was employed as a teacher in the Cleveland Public Schools.

Q. Have you been employed by the Cleveland Public Schools then since 1957?

A. I was employed with the Cleveland Public Schools as a teacher in 1950.

MR KATZ: Your Honor, Mr. Tanczos has been in the courtroom all this time. If he were going to testify, he should have been removed.

MR. CLARKE: He doesn't have to be removed. He is here representing the defendant. He is a party representing the Cleveland Board of Education.

MR. KATZ: Is he named as a party?

MR. CLARKE: No, but he is representing the Cleveland Board of Education. Under the rules we are permitted to have one representative.

THE COURT: Go ahead.

Q. Will you continue.

A. Yes. I was employed as a teacher with the Cleveland Public Schools in 1950, and have been employed by the Cleveland Public Schools since that time.

Q. So since 1950, will you trace your work for the Cleveland Public Schools?

A. From 1950 to 1952 I taught at Alexander Hamilton Junior High School as a science teacher; and from 1952 to 1960 I was a science teacher at South High School. During that period of time from 1957 to 1960, I was head of the Science Department there.

In 1960 I was assigned as Assistant Principal at Collinwood High School. In 1961 I was assigned to the Central Office of the Cleveland Schools as Supervisor of Organization for secondary schools, in which capacity I still serve.

Q. What are your duties and functions as Supervisor of Secondary Education for the Cleveland Public Schools, in general?

A. The function of my office is to staff the secondary schools; that is, junior and senior high schools in the Cleveland City School District.

Q. As such is it necessary for you to become familiar with educational conditions in the junior and senior high schools in the Cleveland Public School System?

A. Yes.

Q. Now, directing your attention, first, to the question of violence in the Cleveland Public Schools; does the Cleveland Public School System keep a record of assaults on teachers in the Cleveland Public Schools?

A. It does.

Q. Is that a written record?

A. Yes, sir.

Q. Referring to that record if need be to refresh your recollection, will you tell the Court how many assaults by students on teachers occurred during the calendar year 1969, during the school year 1969 to 1970.

MR. KATZ: Objection, your Honor.

THE COURT: Overruled. You may answer.

A. During the 1969-70 school year there were 256 assaults upon teachers by students and others in the school.

Q. How many such assaults have occurred to date in the current school year; that is to say, the 1970 to 1971 year, to date?

MR. KATZ: Objection.

THE COURT: He may answer.

A. The most recent information my office has received was that there have been 140 teacher assaults during the current school year.

Q. Will you define to the Court what you mean by "assault," sir.

A. Yes. When I speak of a teacher assault I mean the literal, physical assault upon the body of a teacher or attempt, or a threat of assault by use of a weapon, such as a handgun, knife, or sawed-off shotgun.

Q. Do you know how many handguns, revolvers, and the like, have been confiscated so far this year by appropriate authorities in the Cleveland Public Schools?

MR. KATZ: Objection.

THE COURT: He may answer.

A. At the present time there have been 46 guns and 18 knives confiscated from students during the current school year.

Q. Approximately how many teachers are there in the Cleveland Public School System today?

A. Currently we have 5,859 teachers in the Cleveland Public Schools.

Q. Do you have any statistics on how many of them are women?

A. Yes.

Q. Will you tell the Court what that is?

A. There are 3,774 female teachers in the Cleveland Public Schools.

Q. Are there any figures, either local or national, with reference to the number of—to the percentage of those women who are of child-bearing age?

A. The most recent information that I have came from the National Education Association research report.

MR. KATZ: Objection, your Honor.

Q. Is it a published report?

A. Yes.

Q. Is it published in the field?

A. Yes.

Q. Is it required reading in your office?

A. I would be remiss if I didn't read it.

Q. Do you know anything about the circumstances of the preparation of that research report, how it is prepared?

A. It is prepared by the National Education Association, Research Division.

Q. Is that from statistics gathered all over the United States?

A. Yes.

MR. CLARKE: I submit this carries the circumstantial guarantees of trustworthiness, and would be admissible as a document.

THE COURT: He may answer.

Q. Tell us what the report shows as far as the number of women of marriageable age is concerned, school teaching women.

A. During the 1965-66 school year, which is the most recent survey I have seen, it shows that of 1,200,000 teachers approximately 68 percent were female, and approximately 50 percent of them were ages ranging from less than 25 to 39, which would, in my lay opinion, be of child-bearing age.

Q. Are those figures, so far as you know, consistent with the pattern of the Cleveland Public Schools, those national figures?

A. At the present time 64 percent of the teachers in the Cleveland Public Schools are women.

Q. So the difference is 61 percent nationally and 64 percent in Cleveland?

A. If I may correct you, I believe it is 68 percent nationally and 64 percent in Cleveland.

Q. A difference of 4 percent?

A. Yes.

Q. Now, is there, in addition to assaults by students and others upon teachers in the school, do accidents occur to teachers in the school system?

A. Yes.

MR. KATZ: Objection.

THE COURT: He may answer.

Q. Will you tell the Court, during the last school year, how many accidents occurred to teachers in school.

MR. KATZ: Objection.

THE COURT: He may answer.

A. In 1969, 136 teachers were injured, and this information came to my office on the basis of accident reports filed by teachers.

Q. Written reports filed in your office?

A. Yes.

Q. Now, of those accident reports, just without being specific as to all of them, what kind of accidents occurred most frequently?

A. Falls.

MR. KATZ: Objection.

THE COURT: The answer will stand.

Q. What was your answer? I am sorry.

A. Falls were the most prevalent accident.

Q. You mean teachers losing their balance and falling?

A. Yes, sir, or falling downstairs. There were 41 teacher falls and 25 were falls on the same level, and 16 were falls from one level to another; that is, falling down one step.

MR. KATZ: I move that the answer be stricken.

THE COURT: It will remain. Proceed.

Q. Now, sir, will you describe the duties in general of a teacher of the typical teacher in the Cleveland Public Schools. In addition to her specific teaching duties, what

other duties, if any, does she have and is she expected to perform?

A. He or she would be expected to perform duties in the hallways, in corridors, and recreational areas, between the passing of classes, in order to provide a semblance of order as these youngsters move from one area of the school building to another.

Q. Are the teachers, for example, required to be in the halls in the interim between classes?

A. Yes.

Q. What is the purpose of that?

A. In order to maintain order.

Q. Are the teachers required to be in the cafeteria, or are some teachers in some schools required to be in the cafeteria?

A. Yes.

Q. What is the purpose of that?

A. Again, to maintain order.

Q. Are teachers required to be in study halls sometimes?

A. Yes.

Q. What is the purpose of that?

A. Again, to maintain order and to assist the pupils in any problems they may have with their studies.

Q. Now, has the Cleveland Public School System taken any steps to prevent the violence that you described—these assaults on teachers?

A. Yes.

Q. What have you done?

A. During the past several years we have employed 130 security guards, and have assigned them predominantly to secondary schools within our school system.

Q. Will you define what you mean by a "secondary school."

A. Yes; grades 7 through 12 are considered to be secondary schools in Cleveland.

Q. So now the discipline situation is such that in the last few years you have hired 130 security guards?

A. Yes.

Q. And does this relieve the teachers of their security duties?

A. No, sir, it does not.

Q. Why do the teachers still have security duties if you have security guards?

A. The basic function of a security guard is to prevent outsiders from coming into the school and causing a disruption. The movement of youngsters from one classroom to another still remains the primary responsibility of the teacher rather than the security guard.

Q. Now, sir, we have offered into evidence Joint Exhibit No. 1, which is the Teacher's Handbook. Will you tell the Court how that comes to the attention of the teacher.

A. Yes. I have a copy here. Thank you.

Each year, prior to the opening of the school for students, teachers who are new in the system are provided a pre-school conference where there is some general orientation about the system as a larger system, and then about the subject area which the teacher will essentially be working in, and more specifically about the school in which the teacher—to which the teacher has been assigned.

During the general orientation period the Teacher Handbook is distributed to the teachers new in the system.

Q. And is it the hope of the school administration that all the teachers attend these pre-school conferences?

A. Yes.

Q. And those who do, get a copy of the teacher handbook?

A. Yes.

Q. Now, sir, I will ask you to assume for the moment that there is no maternity leave policy in the Cleveland School System today, so that as the plaintiffs have contended in this case, any teacher could leave the school system at any time during her pregnancy that she and her doctor decided was the time to go.

What effect if any would that have, first of all, on the administrative responsibility of your office—first of all, would it have an effect on your administrative duties?

A. Yes; it would.

Q. Tell the Court what that effect would be.

A. It would create a problem in the identification of a replacement for the teacher.

Q. Will you elaborate, please.

A. Yes. If we are given varying notices of leaves of teachers, and we must act upon short notice in some instances in finding a satisfactory replacement, a fully qualified replacement, it may be that we would have to use temporary help until such time as we found the qualified help.

Q. Now, assuming the same question again, but this time my question to you is: What effect if any would this absence of a maternity leave policy, in your opinion, based upon your opinion and expertise as a teacher of two years and an administrator of ten more; what effect if any would that have on the educational process within the classroom itself?

A. As I mentioned a moment ago, any short notice of a teacher leaving, where we have temporary help, there would be, of necessity, would be a disruption to the edu-

cational process the children were undergoing; and subsequently a further disruption when the qualified teacher became assigned to the classroom.

Q. Now, operating under the maternity leave rule, what difference does it make as far as educational disruption in the classroom is concerned? What effect under the maternity leave rule—what effort if any do you take, under the maternity leave rule, to minimize the disruption of the educational process in the classroom, if I am clear?

A. If your question now is to the last part?—

Q. Yes.

A. —we now request that a teacher notify us one month in advance of her anticipated maternity leave. This provides us with four weeks of seeking the qualified teacher to replace her, and provides a minimal disruption to that classroom.

Q. Now, you have sat through this trial as the representative of the Cleveland Board of Education. Do you recall the testimony of Mrs. La Fleur yesterday, that a qualified student teacher came in and taught with her for a month prior to her departure, prior to her leaving the school?

A. I believe so. In other words, an intern teacher?

Q. Yes; an intern teacher. Do you recall that testimony?

A. Yes.

Q. Tell us how that came about.

A. Yes. Having had a conference with Mrs. La Fleur, and being apprised of the fact that she was in fact pregnant, I began to make plans for her replacement, and as part of those plans I assigned Mrs. La Fleur's eventual replacement to her classroom February the 1st, the second semester, which is February 1st, 1971.

Q. Do I understand then that for a month the replacement was able to be with Mrs. La Fleur in her classroom and see how Mrs. La Fleur taught and become familiar with the children?

A. Yes.

Q. Was that possible because of the maternity leave policy?

A. Yes, it was.

Q. Is that an example of what you are talking about, the minimizing of the disruption?

A. Yes, it is.

THE COURT: May I ask, does that mean while that month is going on that you are paying two teachers?

THE WITNESS: Yes, we are.

THE COURT: How often does that happen?

THE WITNESS: It is not the normal procedure, where we have two teachers in one class assignment, sir.

THE COURT: Do you know how often it happens?

THE WITNESS: No, I do not.

THE COURT: O.K. Pardon me. Go ahead.

Q. A few minutes ago, again, Mr. Tanczos, you listened to Dr. Mark Schinnerer's testimony as to the reasons for the adoption of the maternity leave rule in 1952. I now ask you, in your opinion as a school administrator, based upon your experience as you have given it to us, were the conclusions of Mr. Schinnerer, as to the reasons for the rule then, and the validity of the rule now, agreeable to you? Do you agree or disagree with Dr. Schinnerer's conclusions?

A. I agree with Dr. Schinnerer's conclusions.

Q. I take it then you believe that the rule is necessary for the effective operation of a school system?

A. I do.

THE COURT: We better take our noonday adjournment. We will adjourn, Mr. Rogers, until 1:30.

(Thereupon court was adjourned for the luncheon recess.)

APRIL 20, 1971, 1:30 O'CLOCK P.M.

THE COURT: Please be seated and proceed, gentlemen.

MR. CLARKE: I have completed my direct examination, your Honor.

THE COURT: O.K. Is there cross-examination?

MISS AGIN: Yes, your Honor, if I may.

THE COURT: Surely.

CROSS-EXAMINATION OF JULIUS TANCZOS, JR.

By Miss Agin:

Q. Do you have any personal knowledge of the assaults that you read to us?

A. Would you explain what you mean by "personal"?

Q. You read a certain number of assaults. Do you have personal knowledge of any? Have you seen any of these assaults take place?

A. No, I have not.

Q. Do you know how many of these assaults took place on non-teaching personnel?

A. These were teacher assaults, so they were all on teacher personnel.

Q. How many assaults were on non-pregnant teachers?

A. I don't know that.

Q. It is all in teaching, so no students are included?

A. That is correct. These are assaults on teachers only.

Q. Do you have assaults on students, similar records?

A. I do not.

Q. Do you think that I am as able to defend myself as Mr.—

THE COURT: Wait a minute. The objection is sustained.

Q. Have you ever considered excluding from teachers all women because of their inability to defend themselves?

A. No.

Q. Have you ever considered excluding all women under 150 pounds?

THE COURT: Whether he has considered it or not wouldn't make any difference to me in deciding this lawsuit. There is no answer he could give that would give me help in deciding what I have to decide. Let's have proper questions, please.

Q. You spoke—you gave testimony on the problems of assault in the schools. Do these problems relate to other teachers as well as pregnant teachers?

A. Would you explain to me what you mean by, "relate to other teachers"?

Q. Do non-pregnant teachers get assaulted?

A. I am sure.

Q. Do men teachers with heart conditions get assaulted?

A. I assume that they do.

Q. Isn't there a problem when you are faced with a male teacher with a heart condition, that his assault might cause another heart attack?

A. Would you please repeat that.

Q. Isn't there a problem that an assault on a male teacher with a heart condition may cause him to have another heart attack?

MR. CLARKE: Objection.

THE COURT: Sustained.

Q. You spoke of falls by teachers. How many of these falls were by non-pregnant teachers?

A. I have no knowledge as to whether the teacher was pregnant or not.

Q. How many of these were by pregnant students?

A. None. These were all falls of teachers.

Q. Do you have records on falls of students in your schools?

A. Yes. I am sure there are records of falls of students.

Q. Are you familiar with those records?

A. No, I am not.

Q. Do some teachers begin to look pregnant by the end of their third month of pregnancy?

MR. CLARKE: I object.

THE COURT: Sustained.

Q. Have you ever received reports on giggling at pregnant teachers?

A. No, I have not.

Q. Have you ever received reports on giggling at pregnant students?

A. No, I have not.

Q. Do you ever allow teachers or other personnel to remain in school past the fourth month of pregnancy?

A. There is one exception.

Q. What is the exception?

A. When a teacher is pregnant and the end of her fourth month of pregnancy is within two to three weeks of the end of the school term, we will permit her to complete the school term.

Q. Are you familiar with Myra Clarke? She is an office worker in Patrick Henry Junior High School.

A. No, I am not familiar with her.

Q. Then you would not be familiar with the fact that she stayed until the end of her seventh month?

MR. CLARKE: Objection.

THE COURT: Sustained.

Q. You testified about security guards.

A. Yes.

Q. Do you know the circumstances of the security guards at Patrick Henry Junior High School?

A. Could you give me more information as to your question. I don't understand what you mean by "circumstances."

Q. Do you know where the guards are placed in Patrick Henry Junior High School?

A. The security guards, not only in Patrick Henry, but in all of our secondary schools, are placed at doorways, entrances to the buildings.

Q. Was your earlier testimony that security guards do not relieve teachers from their security functions?

A. Yes.

Q. Do you know that there are security guards in the lunch room at Patrick Henry Junior High School?

A. No, I do not.

Q. Do you know that no teacher has lunchroom duty at Patrick Henry Junior High School?

A. No.

Q. Do you know that no teacher has lunchroom duty at Central Junior High School?

A. No, I do not.

Q. Are you aware that in Central Junior High School there are seven periods this year?

A. Yes. I am familiar with that.

Q. Are you aware that next year there will be seven periods in the junior high schools in this city?

A. No.

Q. Are you aware that study hall will be eliminated next year?

A. No.

Q. Do teachers stand in the halls during the classes?

A. Some teachers do.

Q. When they stand in the hall between classes how long do they actually stand there?

A. It is the normal procedure for the principal to request the teachers stand in the hallway between classes for the entire period of time that students pass from one class to another, and this varies.

Q. Would you give an average?

A. From three to five minutes, depending on the school.

Q. Do you know that in some schools teachers do not stand in the halls during classes?

A. No, I do not.

Q. You testified to the lack of uniformity in notice to the school system where there is no maternity rule.

Now, would a rule providing for notice of one month, or even two months before a teacher leaves, be sufficient to cure this lack of uniformity and notice?

A. Would you repeat the last part of your question, please.

Q. Would a rule providing for notice one month or two months before the teacher, a pregnant teacher, leaves, be sufficient to cure the lack of uniformity in notice?

A. I believe it would.

Q. Are you familiar with the provisions in the rules and regulations governing unrequested leaves of absence?

A. Whose rule are you speaking of?

Q. The Board of Education's rules.

A. The rules relative to unrequested leave of absence?

Q. Yes.

A. Yes.

Q. Are you aware there is no notice requirement in the rules for unrequested leave of absence?

A. Yes.

Can you direct me to the rule that you are relating to—oh, I find it.

Yes. I am familiar with this.

Q. And you are aware there is no notice requirement? Would you like to check the rules for notice requirement in an unrequested leave of absence?

MR. CLARKE: If your Honor please, the rules are in evidence, and I think it speaks for itself.

Q. O.K. Now, if a teacher leaves permanently in the middle of the year for a reason other than pregnancy, how much notice is required by these rules?

A. There is no requirement.

Q. You testified that one month notice must be given for maternity leave.

A. This is our request, yes.

Q. Are you familiar with the maternity leave policies in the Handbook?

A. Yes, I am.

Q. What is the maternity leave stated in there; the notice requirement?

A. One month before.

Q. I beg to differ with you.

A. I am sorry—It states, "two weeks before the effective date of the leave of absence."

Q. O.K.

Now, can I ask you, have you changed the policy to one month, or was your prior testimony mistaken?

A. The policy currently is one month.

Q. But here is the Handbook, and it says "two weeks."

This is the Handbook which you testified is given to your teachers, and yet you have changed the rule and not changed it in the Handbook?

A. That is correct.

Q. O.K. Does the Administrative Code provide that maternity leave is available only to those teachers with one year of continuous service?

A. No.

MISS AGIN: I would like to introduce into evidence a letter written on February 19, by Mr. Tanczos, your Honor.

THE COURT: Do you want to ask a question about it? Show it to him.

MR. CLARKE: May I see the letter?

MISS AGIN: Sure.

Mark it as an exhibit, please.

MR. CLARKE: O.K. No objection, your Honor.

(Thereupon Plaintiff's Exhibit No. 2 was marked for identification by the Clerk.)

Q. Would you please read the first sentence in the second paragraph in this letter to the Court.

A. "In accordance with the policy on maternity leave of absence, it will be necessary that you resign your position with the Cleveland Public Schools insofar as you have not had one continuous year of service."

Q. You wrote this letter?

A. Yes, I did.

Q. Now—well, this regulation, "one year of continuous service," you testified it is not in the Administrative Code, but you mentioned it in this letter?

A. Yes.

Q. Where is it?

A. Here: "On December 14, 1970, as a member of the negotiating team for the Board of Education, in meeting with the Cleveland Teachers Union, this procedure was negotiated to be implemented for the second semester of the current school year."

Q. When did the second semester begin?

A. February 1st, 1971.

Q. And when did Mrs. Nelson apply for her maternity leave?

A. I don't know.

Q. When did Mrs. Nelson state that she was pregnant to her principal?

A. I believe Mrs. Nelson testified it was sometime in January she notified her principal of the pregnancy.

Q. Are you concerned with continuity in the classroom?

A. Yes.

Q. Do you know Mrs. Schickelberg? She is the teacher Mrs. La Fleur replaced?

A. Yes.

MR. CLARKE: The question is, "Do you know," and "Did she replace her?" It is a double question.

A. I understand that she replaced Mrs. Schickelberg.

MR. CLARKE: The question was, "Do you know her?"

THE WITNESS: No.

Q. Do you know the circumstances surrounding her replacement?

A. I believe that Mrs. Schickelberg left the Cleveland schools at the end of the calendar year, 1970.

Q. She was replaced by Mrs. La Fleur?

A. Yes.

Q. At the time she was replaced by Mrs. La Fleur did you know that Mrs. La Fleur was pregnant? Did the principal—I will rephrase that—did the principal know—

MR. CLARKE: I object. The question is, "Did the witness know."

THE COURT: Sustained as to what the principal knows.

Q. Did the principal report to you that Mrs. La Fleur was pregnant?

A. Yes, he did.

Q. Well, why did you replace Mrs. Schickelberg with a pregnant teacher, when you could have replaced her with someone who would have remained until June?

A. That was a commitment to employ Miss Sutton, who eventually replaced Mrs. La Fleur, for employment for the second semester of the current school year.

Knowing that this commitment of employment had been made to Miss Sutton, and knowing that Mrs. La Fleur was pregnant, this information had to be taken into account in terms of the assignment of the teachers to this particular class.

Q. Are you familiar with the circumstances of Mrs. Nelson's replacement?

A. Yes.

Q. When did Mrs. Nelson's replacement begin working with Mrs. Nelson?

A. I believe Mrs. Nelson's replacement was in the building sometime during the week prior to the beginning of Mrs. Nelson's leave.

Q. When did she go to class with Mrs. Nelson?

A. I don't know that.

Q. Did she go to class with Mrs. Nelson the whole time she was in the building?

A. I don't know that.

Q. Do you know Mr. Greenstein at Central Junior High School?

A. I know of Greenstein.

Q. Do you know he left the school system?

A. Yes.

Q. Do you know he was replaced by a student?

A. Yes.

Q. And that a permanent replacement was not found for some time?

A. Yes.

Q. Do you know Mrs. Lukash at Central High School?

A. Yes.

Q. Do you know she was replaced by a student?

A. Yes.

Q. Do you know that it was two weeks before a replacement was brought in?

A. Yes.

Q. So continuity—wouldn't you say that continuity is not possible at all times?

A. Yes.

Q. Do you know about the broken windows at Mrs. Nelson's school?

A. Yes.

Q. Do you know at what time they were broken?

A. No.

Q. Do you know for a fact they were broken when Mrs. Nelson was in class?

A. No, I do not.

Q. Now, what duties of a teacher require great physical exertion?

A. Could you delineate what you mean by "great physical exertion"?

Q. I can't delineate it because the defendant has been suggesting there is "great physical exertion" in teaching, and I would like to know what that great physical exertion is.

A. There is—

THE COURT: Wait a minute. Did you ask that of the people who so delineated?

MISS AGIN: No. It was just brought out in questioning. No one was ever asked. I seek to ask that now.

THE COURT: Seek what?

MISS AGIN: I seek to ask what that great physical exertion was. No one ever answered the question. It was just in questions.

THE COURT: Hold up. Read that back to me. (Thereupon last colloquy was read by the court reporter.)

THE COURT: By "defendant" you mean the Board of Education?

MISS AGIN: Yes.

THE COURT: Are you able to answer the question?

THE WITNESS: I can attempt to, your Honor.

THE COURT: Go ahead. Make the attempt.

A. It is a normal situation for a teacher to be on his or her feet for six periods of a school day. The additional auxiliary duties of a teacher to be in a hallway between the times that the classes are passing from one room to another is also part of their physical effort, if you will.

Beyond that I could not express an opinion.

Q. So that standing—it is standing which is the great physical effort?

A. Yes.

THE COURT: May I find out how long is a period?

THE WITNESS: Yes, sir, your Honor. The normal period for a secondary school in Cleveland is 45 minutes. We have a number of junior high schools currently which are 55 minutes in length, but those have only seven periods a day in the school day.

THE COURT: O.K.

Q. Do teachers, to your knowledge, ever sit during class?

A. Yes.

Q. Do they sit on their lunchroom breaks?

A. Yes.

Q. Do they sit in their class schedule, which is marked for planning sessions?

A. Yes.

Q. So they are not continually on their feet?

A. No.

Q. Can teachers go to the bathroom in the five minutes' break between classes?

A. Yes.

Q. Are there telephones in the classrooms?

A. There are in some schools.

Q. What is the purpose of the telephones?

A. The telephones that are to be found in the classrooms in the Cleveland schools are inter-school telephones. They are not public telephones, and they are used by the administrative staff to contact teachers and/or pupils.

Q. You testified that all teachers received handbooks; these rules and regulations.

MR. CLARKE: I object. He testified that all teachers who are required to attend the preschool conferences received them.

Q. Are you aware that Mrs. Nelson attended the preschool conference?

A. No, I am not.

Q. How would you explain Mrs. Nelson's attendance at this conference and failure to be given this school handbook?

THE COURT: The objection is sustained.

Q. You testified—strike that.

What is the teacher turnover in the inner schools?

A. In the "inner schools"?

Q. Inner city schools, excuse me.

A. It would vary from year to year. On an average it would be between 15 and 20 percent.

Q. Is this higher than the turnover in the better neighborhood schools?

A. I am not sure I know what you mean by "better neighborhood schools."

Q. The schools that are not in the inner city.

A. —but in the city school district?

Q. Yes.

A. This would be slightly higher.

Q. Are you familiar with the turnover rate in suburban school systems?

A. Yes.

Q. Would you say the turnover rate—is the turnover rate in suburban school systems higher than the turnover rate in the inner city schools?

A. Yes.

Q. Higher?

A. —I beg pardon. I would like to correct that statement. No; they are not higher.

Q. Are you familiar with the qualifications of these two inner city teachers?

A. Yes.

Q. Is it difficult to get teachers with these qualifications to work in the inner city schools?

THE COURT: That wouldn't have any probative value in our question here, whether it is difficult or whether it isn't.

MISS AGIN: I think it has probative value.

THE COURT: You have a right to disagree. I am trying to tell you it is an improper question. If you don't want to listen, all right.

Go ahead with a proper question.

Q. Would you consider it judicious to encourage teachers of this quality to stay in the Cleveland Public School System?

MR. CLARKE: Objection.

THE COURT: What he thinks is judicious wouldn't make any difference here.

Q. As an administrator of the school system, do you try to encourage teachers of this quality to stay?

THE COURT: It is the same question in another form.

MISS AGIN: Well, he was asked about the maternity leave.

THE COURT: He was asked many things he shouldn't have been asked, and I am trying to get you to get on the track. It is a legal track we have to go on.

MISS AGIN: No further questions.

THE COURT: I want to ask one question.

Are you able to tell me, sir, on an average, how many pregnant teachers at a given time are off duty due to pregnancy?

THE WITNESS: In the Cleveland School District, your Honor, there are approximately 225 teachers on maternity leave of absence at any given time.

THE COURT: I see. That is a fair average for the year?

THE WITNESS: This is an estimate on my part, sir.

THE COURT: And it has to do with those who are off duty because of the five month rule?

THE WITNESS: Yes.

THE COURT: O.K. That is what I wanted to know.

REDIRECT EXAMINATION OF JULIUS TANCZOS, JR.

By Mr. Clarke:

Q. Mr. Tanczos, it requires great physical exertion to resist assault on the part of a teacher?

A. Yes, it does.

RECROSS-EXAMINATION OF JULIUS TANCZOS, JR.

By Miss Agin:

Q. Would the physical exertion be the same from the non-pregnant person as from a pregnant person?

MR. CLARKE: Objection. That is a medical question.

THE COURT: Yes. That is a medical question.

MISS AGIN: No further questions.

MR. CLARKE: That is all I have.

THE COURT: That is all, sir. Thank you.

MR. CLARKE: The defendants rest, your Honor.

THE COURT: Proceed.

MR. KATZ: We have nothing further, your Honor.

THE COURT: Well, I better talk to counsel for a minute then. Come up, please.

(Thereupon bench conference ensued off the record.)

THE COURT: Let the record show that counsel preferred at this time not to make any effort to argue the case, but to file additional briefs; and Mr. Clarke has until the 27th of April to file his, and Mr. Katz has to May 4th to file his; and that concludes our work for the day.

We will take an adjournment until 10:00 o'clock tomorrow morning.

(Court was adjourned.)

CERTIFICATE

I, Roy Thompson, Jr., Official Court Reporter in and for the District Court of the United States for the Northern District of Ohio, Eastern Division, do hereby certify the above and foregoing is a true and correct transcript of the proceedings herein.

ROY THOMPSON, JR.
Official Court Reporter

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

JO CAROL LA FLEUR.

Plaintiff.

v.

**CLEVELAND BOARD OF
EDUCATION, et al.,**

Defendants

CIVIL
ACTION
NO. C 71-292

ANN ELIZABETH NELSON.

Plaintiff,

y.

**CLEVELAND BOARD OF
EDUCATION, et al.,**

Defendants

**CIVIL
ACTION
NO. C 71-333**

) MEMORANDUM
) and
) ORDER

CONNELL, J.

This case has been presented to this Court asking for injunction against the defendant, Cleveland Board of Education, from enforcing a regulation of the Cleveland School Board prohibiting teachers who become pregnant from teaching their classes past the fourth month of pregnancy.

The plaintiffs in the case, Jo Carol La Fleur and Ann Elizabeth Nelson are teachers in the Cleveland Public School system. Both teachers are married and pregnant; Mrs. La Fleur is expecting birth of her child sometime from the mid to the end of July of this year, while Mrs. Nelson expects her child on August 26, 1971.

Mrs. Jo Carol Le Fleur, C71-292, is a teacher at Patrick Henry Junior High School and has taught her class from September 1970 until March 12, 1971 when, due to the enforcement of the school board regulation, she was asked to discontinue her duties due to her pregnancy. The plaintiff, La Fleur, taught a seventh grade class composed exclusively of girls who are designated as under-achievers or problem children. This class is called a "project transition" class which is supervised and operated by the Cleveland public school and partially funded with Federal money. This class is composed exclusively of girls, about twenty-five in number, to be being given special attention for purposes of making them ready for the eighth grade in school. Mrs. La Fleur did not request the maternity leave, rather the regulation was enforced as to this plaintiff and her maternity leave was involuntary. Presently, in her absence, the class is being taught by a substitute teacher.

The plaintiff, Ann Elizabeth Nelson, C 71-333, is a French teacher at Central Junior High School. She has taught French to seventh, eighth and ninth grade students since September 1970. Mrs. Nelson reported her pregnancy to her principal on January 29, 1971, and applied for maternity leave.

This case came on for hearing on April 19, 1971. The issues being identical in nature, the cases were tried and submitted together and both will be decided in this memorandum and order.

The regulation in question concerns maternity leaves of absence for teachers and is stated on pages 20-21 of the teachers handbook, Joint Ex. 1. The regulation provides that:

"Any married teacher who becomes pregnant and who desires to return to the employ of the Board at a future date may be granted a maternity leave of absence without pay."

The application of this regulation provides that the absence shall be effective not less than five months before the expected date of the normal birth of the child. Further, the regulation states that in application; this leave of absence shall be effective not less than five months before the expected date of the normal birth of the child, and application for such leave to the superintendent at least two weeks before the effective date of the leave of absence.

The plaintiffs contend that this regulation discriminates against the plaintiffs as female employees with respect to their employment and deprives them of their "rights, privileges and immunities secured by the Constitution and laws of the Civil Rights Act of 1871, (42 U.S.C. § 1983)." Plaintiffs pray this Court grant a Declaratory Judgment ruling that the policies and practices of the school board are unlawful, and further the plaintiffs request the granting of a preliminary and permanent injunction enjoining the Cleveland Board of Education from discriminating against the plaintiffs on the "basis of sex with respect to the terms and conditions and privileges of her employment and compensation thereof in deprivation of her rights, privileges and immunities secured by the United States Constitution and laws and the Civil Rights Act of 1871."

The defendants maintain that the regulation is a "valid exercise of the school board's statutory authority to make

rules and regulations for its government and the government of its employees and the pupils of the school, pursuant to Ohio Revised Code Section 3313.20." The defendants further contend that "the maternity leave policy violates no constitutional rights of the plaintiff and is not discriminatory in any sense, let alone a per se discrimination based wholly on sex."

This Court reads the complaint as being brought pursuant to 42 U.S.C. § 1983 for an alleged violation of the plaintiffs' guarantee of equal protection under the Fourteenth Amendment to the United States Constitution. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1343; giving the district court original jurisdiction to hear cases for redress of deprivations arising under color of State law for alleged violations of privileges or immunities secured by the Constitution of the United States or by any act of Congress providing for the equal rights of citizens.

It is necessary to point out that the plaintiffs have not brought this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*

The facts show that the maternity regulation in question was adopted in the early fifties upon the request of Dr. Mark C. Schinnerer, Superintendent of the Cleveland Public Schools. Prior to this time no maternity leave regulation had been in effect. The rule as it appears today is essentially the same as it was when adopted. The change in the rule now permits the mother to return at the beginning of the semester following the age of three months of the new child rather than the six months as previously provided. Also, the regulation now asks for one month's notice of pregnancy leave prior to the termination of employment rather than two week's notice as stated in the regulations as it now appears.

The evidence shows that prior to the rule, the teachers suffered many indignities as a result of pregnancy which consisted of children pointing, giggling, laughing and making snide remarks causing interruption and interference with the classroom program of study. The evidence shows that there were numerous reports of similar incidents which brought about the need for the Board of Education to prevent the continuance of this disruptive situation.

The evidence further shows that there were many instances where teachers refused to voluntarily withdraw from teaching until the birth of the child; and although no child was born in the classroom, a few times it was very close. The evidence shows that in one instance where a teacher's pregnancy was advanced, children in a Cleveland junior high school class were "taking bets on whether the baby would be born in the classroom or in the hall." Dr. Schinnerer testified that the purpose of this rule was to protect the teacher and maintain the continuity of the classroom program. When the regulation was presented to the Board of Education for adoption, at a public meeting, the vote of the Board of Education was unanimous.

The Cleveland Board of Education is concerned with the well-being of over 5800 teachers, of which 3774 are women. It is further pointed out that fifty percent of these women are of childbearing age, and that an average of 225 teachers are on maternity leave at all times.

A plaintiffs' witness testified that the incidence of violence in the Cleveland schools had increased steadily over the last ten years. The concurring evidence of Mr. Julius Tanczos, Supervisor of Secondary Organization of the Cleveland public schools shows that there were 256 assaults upon teachers by pupils and others, within the school buildings in the 1969-70 school year. The record shows that up to the date of the lawsuit, 140 such assaults

had already taken place. The school system classifies an assault as the physical contact with the person or the threatening of a teacher with a weapon. This year alone, there has been the confiscation of 46 guns and 18 knives in the Cleveland public schools. Further it is shown that there were 136 teachers accidentally injured as the result of falls in corridors and hallways during the 1969-70 school year.

The duties of a teacher in the Cleveland public schools require her to be on her feet much of the day, and aside from teaching, they include the maintenance of order in the classrooms and the supervision of the movement of students in the halls, corridors and sometimes in the cafeterias. In addition to the teachers, the public school system employs 132 security guards which are stationed in the secondary schools, grades seven thru twelve, for the specific purpose of maintaining order and keeping outsiders from entering the school building.

With respect to the health of a pregnant teacher, during a normal pregnancy, the woman should gain between fifteen and twenty pounds. Pregnancy is a normal condition; and these individuals may continue to lead normal lives, however, the evidence shows complications can arise and the resulting effects can be very serious.

The evidence shows that toxemia occurs in as high as ten percent of pregnancies. This condition can occur slowly and may be unforeseen and will prohibit the individual from working until the condition is brought under control. The more serious complication of placenta previa occurs in one percent of the pregnancies and this condition is very serious and its gravity greatly increases should it occur after the sixth month. This condition can be brought about by a sudden or violent physical exertion and can result in the woman's death; immediate hospitalization is required.

It is further shown that the frequency of urination increases during the last three months of pregnancy, the woman's agility is impaired, and strenuous, sudden physical exertion is forbidden.

The evidence shows that the primary purpose for the initiation of this rule was to protect the continuity of the classroom program. The school board maintains this rule in an attempt to bring the disruption of the classroom program to a minimum. They further maintain that use of the one month advance notice requirement gives the school board the most accurate indication as to when the teacher will discontinue her duties and the new instructor will assume the responsibility of the study program. The purpose is also to allow the new teacher to become familiar with the classroom program and the students under the guidance of the original teacher who is about to depart. Furthermore, the purpose is to give the school board notice so that the original teacher's unexpected and sudden leave will not occur, and thus guaranteeing classroom continuity and providing the best possible safeguard against the disruption of the students' education. The intended purpose of the section in the regulation which permits the teacher to return at the beginning of the regular school semester following the child's age of three months is designed to protect the health of the mother and the child and assure continuity of the classroom program.

The Cleveland Board of Education is authorized to initiate such rules and regulations pertaining to employees and pupils as are necessary for the operation of its government. See Ohio Revised Code § 3313.20. The regulation in question had been made pursuant to this state statute and from this state action the Fourteenth Amendment question comes before this Court.

In *Morey v. Doud*, 354 U.S. 457, 463-64 (1954) the

Court summarized the rules for testing discrimination under the Fourteenth Amendment and states as follows:

"The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon a reasonable base, but is essentially arbitrary. *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911).

In speaking of the "Equal Protection" clause of the Fourteenth Amendment, the Court in *McGowan v. Maryland*, 366 U.S. 420, 425 (1960) stated;

"the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their law results in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

In *Williams v. McNair*, 316 F. Supp. 134, 136 (1970) a three judge panel in deciding whether men have the right to gain admission to an all girls' college said:

"The Equal Protection Clause of the Fourteenth Amendment does not require identity of treatment for all citizens, or preclude a state, by legislation, from making classifications and creating difference in the rights of different groups. It is only when the discriminatory treatment and varifying standards, as created by legislative or administrative classification are arbitrary and wanting in any rational justification that they offend the Equal Protection Clause." (Citations omitted.)

Limitations placed upon women have been held as non-discriminatory. In *Muller v. Oregon*, 208 U.S. (1908) the Court in deciding a work hour limitation statute pertaining to women took into consideration the differences in the sexes and said:

"The two sexes differ—in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-contained labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her."

The Court in *Seidenberg v. McSorley's Old Ale House, Inc.*, 317 F. Supp. 593 (1970), found no justification for a rule which excluded women as potential customers in an ale house while giving preference to men.

This Court finds that the enormous task of providing an education for thousands of young students, and the regulations enacted in the furtherance of this purpose has no relevance to a regulation enacted by an ale house prohibiting the sale of alcoholic beverages to women and will be given no weight by this Court.

The plaintiffs cite *Schattmann v. Texas Employment Commission*, 3 CCH para. 8146, p. 6459 (W. D. Tex. 1971) in which jurisdiction for relief is based upon Title VII of the Civil Rights Act of 1964, § 2000 *et seq.* of Title 42 U. S. C., as earlier pointed out, this is not the basis of jurisdiction in the instant case and the resulting difference in the applicable test is afforded little consideration. Furthermore, *Schattmann* did not involve a situation in which the education of children presented a most important issue. In *Schattmann*, *supra*, p. 6460, the stipulation that the plaintiff "was a permanent desk worker whose job entailed no significant physical exertion of personal contact with the public" could not be further from the necessary demands of a junior high school teacher responsible for the education of students in the Cleveland schools.

The plaintiffs maintain that the traditional "reasonable basis test", *Lindsley supra.*, is not applicable in this case. Their contention being that *Shapiro v. Thompson*, 394 U.S. 618 (1969), requires that for this Court to uphold the regulation in question the states meet the burden of showing a compelling state interest. In *Shapiro*, what was in question was the plaintiff's right to travel in interstate commerce and its resulting qualification for public assistance. In this instance the Court stated on page 638:

"Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest."

The *Shapiro* case requires a stricter standard in judging cases involving fundamental rights. However, allegations alone are not the criteria for automatic application of this standard.

The plaintiffs, citing *Shapiro*, presume their contentions are of fundamental concern preempting the considerations of the school board and giving rise to the

application of this stricter standard. The primary duty of the school board is to educate students, and if necessary regulations may be enacted in the furtherance of this function. Education is the right of a child, and the school board is before this Court protecting these rights which involved the thousands of students within its jurisdiction.

Speaking of this right, the Supreme Court stated in *Brown, et al. v. Board of Education of Topeka, et al.*, 394 U.S. 483, 493 (1954) that;

"Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

The rights in this case weigh most heavily with the students, and this Court holds that those assaulting this most serious concern of the school board must meet the traditional due process test of showing that the regulation is without a reasonable basis.

The Cleveland public schools had operated prior to the early 1950's without this maternity leave rule, and the experiences were such that the Board was compelled to adopt a regulation to remedy this impediment to its educational function.

This requirement of maternity leave gives the school the best assurances that sudden disruption of the students' classroom program due to an unforeseen complication in the teacher's condition will be minimized. The requirement of advance notice of termination also allows time for a substitute teacher to work and train with the intended class prior to assuming her full responsibilities, further maintaining continuity in the classroom program. The provision for resumption of employment after the child's birth serves the purposes of maintaining classroom continuity and protecting the health of the mother and child.

7
This regulation has minimized the classroom distractions and disruptions which had occurred prior to its adoption, further attesting to its necessity and reasonableness, and this court so finds.

The problem of the teacher's health and safety, before and after the child's birth, is of itself a valid concern of the school board aside from its interest in the students' education.

In an environment where the possibility of violence and accident exists, pregnancy greatly magnifies the probability of serious injury.

This court finds that for the reasons stated herein, the regulation in question is entirely reasonable, and most adequately meets the prescribed tests.

This court finds that the Cleveland Board of Education has not discriminated as to women whose condition is attendant to their sex.

This court finds that there is a reasonable basis for the rule which distinguishes pregnant teachers from all other teachers.

This court finds that no showing of a violation of the plaintiffs' constitutional rights has been made.

This court finds that the regulation furthers the design for quality education, and serves the important interests of the students in implementing this fundamental right.

This court finds that the plaintiffs' burden of showing that the maternity leave of absence is arbitrary and unreasonable has not been sustained.

In accordance, the maternity regulation of the Cleveland Board of Education is sustained in its entirety.

230a

This constitutes the findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

James C. Connell, Judge
United States District Court

Dated May 12th, 1971.

231a

**THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO**

Judge's Chambers

Cleveland, Ohio 44114

May 17, 1971

Gentlemen:

A correction has been made in the original memorandum, *La Fleur and Nelson v. Cleveland Board of Education*, C 71-292 and C 71-333, respectively.

On page 12, line 19 (quote not included), the word *due process* has been changed to *equal protection*.

Enclosed is the respective page which may be substituted in the original copy.

Thank you.

James C. Connell, Judge
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

JO CAROL LA FLEUR,)	
<i>Plaintiff</i>)	
v.)	Civil Action
CLEVELAND BOARD OF)	No. C71-292
EDUCATION, et al.,)	
<i>Defendants</i>)	
ANN ELIZABETH NELSON,)	
<i>Plaintiff</i>)	Civil Action
v.)	No. C71-333
CLEVELAND BOARD OF)	
EDUCATION, et al.,)	NOTICE OF
<i>Defendants</i>)	APPEAL

Notice is hereby given that Jo Carol La Fleur and Ann Elizabeth Nelson, plaintiffs above named hereby appeal to the United States Court of Appeals for the Sixth Circuit from the final judgment entered in this action on the 12th day of May, 1971.

May 25, 1971

CAROL S. AGIN
3459 Glencairn Road
Shaker Heights, Ohio 44122
Tel: 283-1653
Attorney for Plaintiff

OPINION OF THE COURT OF APPEALS

No. 71-1598

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JO CAROL LA FLEUR AND ANN ELIZ-
ABETH NELSON,*Plaintiffs-Appellants,*

v.

CLEVELAND BOARD OF EDUCATION,
ET AL.,*Defendants-Appellees.*APPEAL from the
United States Dis-
trict Court for the
Northern District
of Ohio, Eastern
Division.

Decided and Filed July 27, 1972.

Before: CLARK, Associate Justice,* PHILLIPS, Chief
Judge, and EDWARDS, Circuit Judge.

EDWARDS, Circuit Judge. This is a complaint alleging violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. It is brought on behalf of two pregnant school teachers in the Cleveland school system under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970). Each has been placed on "maternity leave" involuntarily and seeks reinstatement with back pay and injunctive relief against the implementation of the school board's maternity leave policy. Each claims that the school board's rule is an unconstitutional discrimination on grounds of sex.

The rule appellants attack has the effect of requiring a pregnant teacher to take unpaid leave of absence from

* Honorable Tom C. Clark, Associate Justice of the Supreme Court of the United States, Retired, sitting by designation.

her school duties five months before the expected birth of a child and to continue on such status thereafter until the beginning of the first school term following the date when the baby becomes three months old.

The school board rule under attack provides as follows:

"Any married teacher who becomes pregnant and who desires to return to the employ of the Board at a future date may be granted a maternity leave of absence without pay.

"APPLICATION A maternity leave of absence shall be effective not less than *five (5) months before the expected date* of the normal birth of the child. Application for such leave shall be forwarded to the Superintendent at least *two (2) weeks before the effective date of the leave of absence*. A leave of absence without pay shall be granted by the Superintendent for a period not to exceed *two (2) years*.

"REASSIGNMENT A teacher may return to service from maternity leaves not earlier than the *beginning of the regular school semester which follows the child's age of three (3) months*. In unusual circumstances, exceptions to this requirement may be made by the Superintendent with the approval of the Board. *Written request for return to service from maternity leave must reach the Superintendent at least six (6) weeks prior to the beginning of the semester when the teacher expects to resume teaching and shall be accompanied by a doctor's certificate stating the health and physical condition of the teacher. The Superintendent may require an additional physical examination.*

"When a teacher qualifies to return from maternity leave, she shall have priority in reassignment to a vacancy for which she is qualified under her certificate, but she shall not have prior claim to the exact position she held before the leave of absence became effective.

"A teacher's failure to follow the above rules for maternity leave of absence shall be construed as termination of contract or as grounds for dismissal." (emphasis in original)

The District Judge who heard this case took extensive testimony, made findings of fact and concluded that the Cleveland Board of Education's rule did not discriminate against women and was not so unreasonable or arbitrary as to be unconstitutional. The basic rationale for the District Judge's holding is set forth as follows:

"The evidence shows that the primary purpose for the initiation of this rule was to protect the continuity of the classroom program. The school board maintains this rule in an attempt to bring the disruption of the classroom program to a minimum. They further maintain that use of the one month advance notice requirement gives the school board the most accurate indication as to when the teacher will discontinue her duties and the new instructor will assume the responsibility of the study program. The purpose is also to allow the new teacher to become familiar with the classroom program and the students under the guidance of the original teacher who is about to depart. Furthermore, the purpose is to give the school board notice so that the original teacher's unexpected and sudden leave will not occur, and thus guaranteeing classroom continuity and providing the best possible safeguard against the disruption of the students' education. The intended purpose of the section in the regulation which permits the teacher to return at the beginning of the regular school semester following the child's age of three months is designed to protect the health of the mother and the child and assure continuity of the classroom program." *La Fleur v. Cleveland Board of Education*, 328 F. Supp. 1208, 1211 (N.D. Ohio 1971).

Appellants' contentions are that the rule is arbitrary and unreasonable in its overbreadth and that it is a discriminatory rule applicable to only one sex, in violation

of the equal protection clause of the Fourteenth Amendment.

It is relevant for us to note two developments which have occurred since this case was argued. First, in a split decision a panel of the Fifth Circuit held a distinctly less onerous maternity leave rule of the Texas Employment Commission not to be arbitrary and unreasonable in a constitutional sense. *Schattman v. Texas Employment Commission*, — F.2d — (5th Cir. 1972). (Decided March 1, 1972, order amending Judge Wisdom's Opinion dated March 17, 1972.)

Second, Congress has now amended Title VII of the Equal Employment Opportunity Act to make it applicable to public schools. 42 U.S.C. § 2000e(a), P.L. 92-261, 86 Stat. 103 (1972). The EEOC has also adopted a rule prohibiting special maternity leave disability rules as discriminatory on grounds of sex. 29 C.F.R. § 1604.10(b), 37 Fed. Reg. 6837 (April 5, 1972).

While clearly neither of these last decisions controls our present case, they do tend to lessen the reach of our holding.

The Cleveland Board of Education maternity leave rule was adopted in 1952. It is considerably more severe in its effect upon employment of pregnant teachers than the Texas Employment Commission rule dealt with in the *Schattman* case, or any other similar rule which has been called to our attention. Depending on the period of the year when the birth of the child was expected, the effect of the rule would be to put any pregnant teacher on involuntary leave for a period ranging from six months to over a year. The Texas Employment Commission rule required leave to be taken two months before expected birth and an application to return to work could be filed at any time thereafter.

The principal social purpose claimed to be served by the Cleveland Board of Education rule is continuity of classroom instruction and relief of burdensome administrative problems. Yet any actual disability imposed on any teacher, male or female, poses the same administrative problems and many (including flu and the common cold) can't be anticipated or planned for at all. This rule may arguably make some administrative burdens lighter. But these are not the only values concerned. The Supreme Court reminds us:

"The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

"Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand." *Stanley v. Illinois*, — U.S. — (1972) (decided April 3, 1972) (Slip Opinion at 11-12). (Footnotes omitted.)

The three month enforced unemployment after birth has no relation to the employer's interest at all. While having a mother with her infant for a period after birth may arguably be a question of general state concern, Ohio has not thus far expressed it in any general and nondiscriminatory statute.

Appellees also urge consideration of a view expressed by the author of this rule when in 1952 he suggested its adoption. Dr. Schinnerer testified that he thought that absent the rule, pregnant teachers would be subjected to "pointing, giggling and . . . snide remarks" by the students. Basic rights such as those involved in the employment relationship and other citizenship responsibilities cannot be made to yield to embarrassment. See *Abbott v. Mines*, 411 F.2d 353 (6th Cir. 1969). Additionally, at the present time pregnant students are allowed to continue in the Cleveland schools without any apparent ill effects upon the educational system.

If there is substantial support for the Cleveland Board of Education rule to be found in this record, it must be in the testimony of the Board's witness Dr. William C. Wier, who discussed the problems of pregnancy with obvious concern. But Dr. Wier also testified that "each pregnancy is an individual matter." And his cross-examination concluded as follows:

"Q How would you advise a working woman who is pregnant as to her continued employment?

A I would first inquire what type of employment she was on — doing. If it involved physical activities, and in excess of what I would consider normal or potentially in excess, I would advise her probably that she should stop working at an earlier time than somebody who was sitting entirely at a desk job.

• • •

A (Continuing) What I was going to say is that I have had patients that worked as secretaries throughout pregnancy, and I have seen nurses that worked in the hospital going to term and practically going from the nurse's station up to the delivery room.

Now, usually the hospitals — in this situation, would put these nurses in the type of job on the hospital floor in which their physical activities were considerably reduced, and not require them to do as much; but in general I have never said to a patient, 'You can't do this or that.' I can only advise them.

Q Doctor, have you treated patients who have worked through or worked beyond the end of the fourth month of their pregnancy?

A Of course I have — many.

Q Have you always disapproved of this?

A No.

Q Have you told the women to stop working?

A I have on occasion suggested it would be a wiser thing if they discontinued work.

Q But not always?

A Oh, no."

Under no construction of this record can we conclude that the medical evidence presented supports the extended periods of mandatory maternity leave required by the rule both before and after birth of the child.

In a case decided after the District Court decision in this case, the United States Supreme Court invalidated a statute of the State of Idaho which specifically preferred male relatives over female relatives as administrators of estates. The Court's opinion commented:

"Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether § 15-314 advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elim-

ination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex." *Reed v. Reed*, 404 U.S. 71, 76-77 (1971).

Here, too, we deal with a rule which is inherently based upon a classification by sex. Male teachers are not subject to pregnancy, but they are subject to many types of illnesses and disabilities. This record indicates clearly that pregnant women teachers have been singled out for unconstitutionally unequal restrictions upon their employment. Additionally, as we have observed, the rule is clearly arbitrary and unreasonable in its overbreadth. As the Supreme Court said in *Wieman v. Updegraff*, 344, U.S. 183 (1952):

"We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Id* at 192.

We believe that the Fifth Circuit's decision in *Schattman v. Texas Employment Commission*, *supra*, is easily distinguishable on the facts and that the same is true in relation to *Struck v. Secretary of Defense*, — F.2d — (9th Cir. 1971), which dealt with pregnancy of a female officer in a war zone. On the other hand, there is a marked trend of cases to invalidate regulations based on sex classifications unless supported by a valid state interest. *Reed v. Reed*, *supra*; *Sail'er Inn v. Kirby*, 95 Cal. Rptr. 329, 485 P.2d 529 (1971); *Cohen v. Chesterfield County School Board*, 326 F. Supp. 1159 (E. D. Va. 1971); *Seidenberg v. McSorley's Old Ale House, Inc.*, 317 F. Supp. 593 (S.D. N.Y. 1970); *Kirstein v. Rector of University of Virginia*,

309 F. Supp. 184 (E. D. Va. 1970); *Heath v. Westerville Board of Education, et al.* — F. Supp. — Civil #71-379, S.D. Ohio June 29, 1972.

We do not, of course, by our holding concerning this rule deal with reasonable employer requirements of notice of impending disability or of health examinations or certificates. Such issues are not presented by this appeal.

The judgment of the District Court is vacated and reversed and the case is remanded for further proceedings consistent with this opinion.

PHILLIPS, Chief Judge. (Dissenting in part, concurring in part.) I respectfully dissent from the part of the majority opinion which strikes down the regulation pertaining to maternity leave prior to delivery.

It is my opinion that the pre-delivery part of the rule of the Cleveland Board of Education under attack on this appeal is a permissible and reasonable exercise of the discretion vested in the Board in the administration of the school system. I see no violation of the rights of teachers under the Equal Protection Clause presented by the facts and circumstances of this case.

"Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . .

By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (footnote omitted).

The capabilities of its teachers and the maintenance of sound educational environment are matters of legitimate concern to the Board of Education. The evidence presented to the District Court shows that about 225 out

of the more than 5800 teachers employed by the Board in the Cleveland school system are on maternity leave at any given time and that approximately 1900 teachers are women of child bearing age. Expert testimony established that every pregnancy impairs to some degree the ability to teach and supervise children. Pregnancy limits the capacity of the teacher to engage in normal physical activity. Mobility is reduced. A pregnant teacher is subjected to an increased risk of unexpected incapacitation. Such impairment and risk increase during the later months of pregnancy. There is no question that the medical condition of a pregnant teacher will require that she discontinue teaching at some point during the course of the pregnancy.

Appellants urge that the determination of this point of time should be made on an individual basis, relying on the thirty day notice requirement as ample to meet the objectives of the Board. The record in this case convinces me that there is no assurance that an individualized decision in all cases can be made thirty days prior to the time that medical necessity may require a teacher to discontinue her classroom duties. To impose upon the school system the obligation of examining each teacher individually throughout the course of her pregnancy to insure that she is capable of carrying out the manifold and demanding duties of her profession would constitute a burden more onerous than mere administrative inconvenience.

In my view it is not the prerogative of this court to determine whether a better regulation could be promulgated or whether a shorter period of time than the end of four months of pregnancy should be prescribed. We do not sit as a super Board of Education. Our concern is whether the regulation creates an arbitrary or unreasonable classification wholly unrelated to the objectives sought to be advanced by the Board of Education in adopting it. In my

opinion, we should not strike down the regulation because it "may be unwise, improvident, or out of harmony with a particular school of thought." See *Dandridge v. Williams*, 397 U.S. 471, 484.

Nor do I agree that the regulation should be invalidated because it applies only to pregnancy and not to other conditions and diseases that incapacitate teachers, both male and female, from classroom duties. It is true that, during the course of a school year, a certain number of teachers will experience illness or accidents requiring leaves of absence. The wide range of these incapacitating conditions is such that the Board of Education has seen fit to deal with them on an individual basis. Pregnancy, on the other hand, is a condition of predictable duration and symptoms involving a substantial number of teachers every year. In my opinion a classification dealing with this problem is not so arbitrary or unreasonable as to violate the Equal Protection Clause.

It is not every classification that amounts to a denial of equal protection.

"The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. . . . [C]lassifications will be set aside only if no grounds can be conceived to justify them. With this much discretion, a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' and a legislature need not run the risk of losing an entire remedial scheme simply because it failed . . . to cover every evil that might conceivably have been attacked." *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 809 (1969) (citations omitted).

Upon the evidence presented in the District Court, Judge Connell found that the requirement of maternity leave prior to delivery gives the school system the best assurance that sudden disruption of the classroom program due to unforeseen complications in the condition of a teacher will be minimized. 326 F.Supp. at 1213. I agree with this conclusion. In my view it is not "clearly erroneous." Rule 52(a), Fed. R. Civ. P.

With respect to the three months post-delivery waiting period before resuming teaching, I agree with the majority opinion. No evidence was introduced in the District Court and no reasons offered to this court as to how this requirement is related rationally to any legitimate objective of the Board.

I would affirm in part and reverse in part.

**ORDER ON MOTION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC**

(Filed August 29, 1972)

No. 71-1598

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JO CAROL LA FLEUR AND ANN ELIZABETH NELSON,

Plaintiffs-Appellants,

v.

CLEVELAND BOARD OF EDUCATION, ET AL.,

Defendants-Appellees.

ORDER

Before: CLARK, Associate Justice,* PHILLIPS, Chief Judge, and EDWARDS, Circuit Judge.

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above-styled case, and no judge having moved for rehearing en banc, said petition for rehearing is hereby denied. Judge Phillips dissents.

Entered by order of the Court

JAMES A. HIGGINS

Clerk

* Honorable Tom C. Clark, Associate Justice of the Supreme Court of the United States, Retired, sitting by designation.

CERTIFICATE OF SERVICE

Three copies each of the Petition for a Writ of Certiorari and Appendix have been mailed this 25th day of

November, 1972, by depositing the same in a United States Mail Box, First Class, postage prepaid, addressed to Carol S. Agin, 3800 Lake Shore Drive, Apt. 5E, Chicago, Illinois, 60613, and Lewis R. Katz, 2145 Adelbert Road, Cleveland, Ohio 44106, attorneys for plaintiffs-appellants; Sidney Picker, Jr., 3079 Van Aken Boulevard, Shaker Heights, Ohio 44120, attorney for Women's Equity Action League; David Rubin, 1201 Sixteenth Street, N.W., Washington, D.C. 20036 and Jerry D. Anker, 1730 M. Street, N.W., Washington, D.C. 20036, attorneys for the National Education Association; Lucille Houston, 816 Engineers Building, Cleveland, Ohio 44114, attorney for the American Civil Liberties Union; Susan Deller Ross, 1800 G Street, N.W., Washington, D.C. 20506, attorney for the United States Equal Employment Opportunity Commission, and Jordan Rossen, 8000 East Jefferson Avenue, Detroit, Michigan 48214, attorney for International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), *amici curiae*.

CHARLES F. CLARKE
Attorney for Petitioners

247a

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D. C. 20543

April 23, 1973

Charles F. Clarke, Esq.
Squire, Sanders & Dempsey
1800 Union Commerce Bldg.
Cleveland, Ohio 44115

RE: Cleveland Bd. of Education v. LaFleur,
No. 72-777; Cohen v. Chesterfield County
School Bd., No. 72-1129

Dear Mr. Clarke:

The Court today took the following action in the above cases:

"The motion to dispense with printing petitioners' supplemental brief in 72-777 is granted. The petitions for writs of certiorari are granted and the cases are set for oral argument in tandem."

Enclosed are memorandums describing the time requirements and procedures under the Rules.

The additional docketing fee of \$50, Rule 52(a), is due and payable in No. 72-7777.

For your information I give the names of counsel in No. 72-1129 on the attached sheet.

Very truly yours,

MICHAEL RODAK, JR., Clerk

(Mrs.) Helen K. Loughran
Assistant Clerk

AIR MAIL
Enclosures

No. 72-777

Counsel in No. 72-1129

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LIBRARY
SUPREME COURT, U. S. APPENDIX

FILED

JUL 9 1973

MICHAEL DONALD, JR. CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1972

No. 72-1129

SUSAN COHEN, *Petitioner*

v.

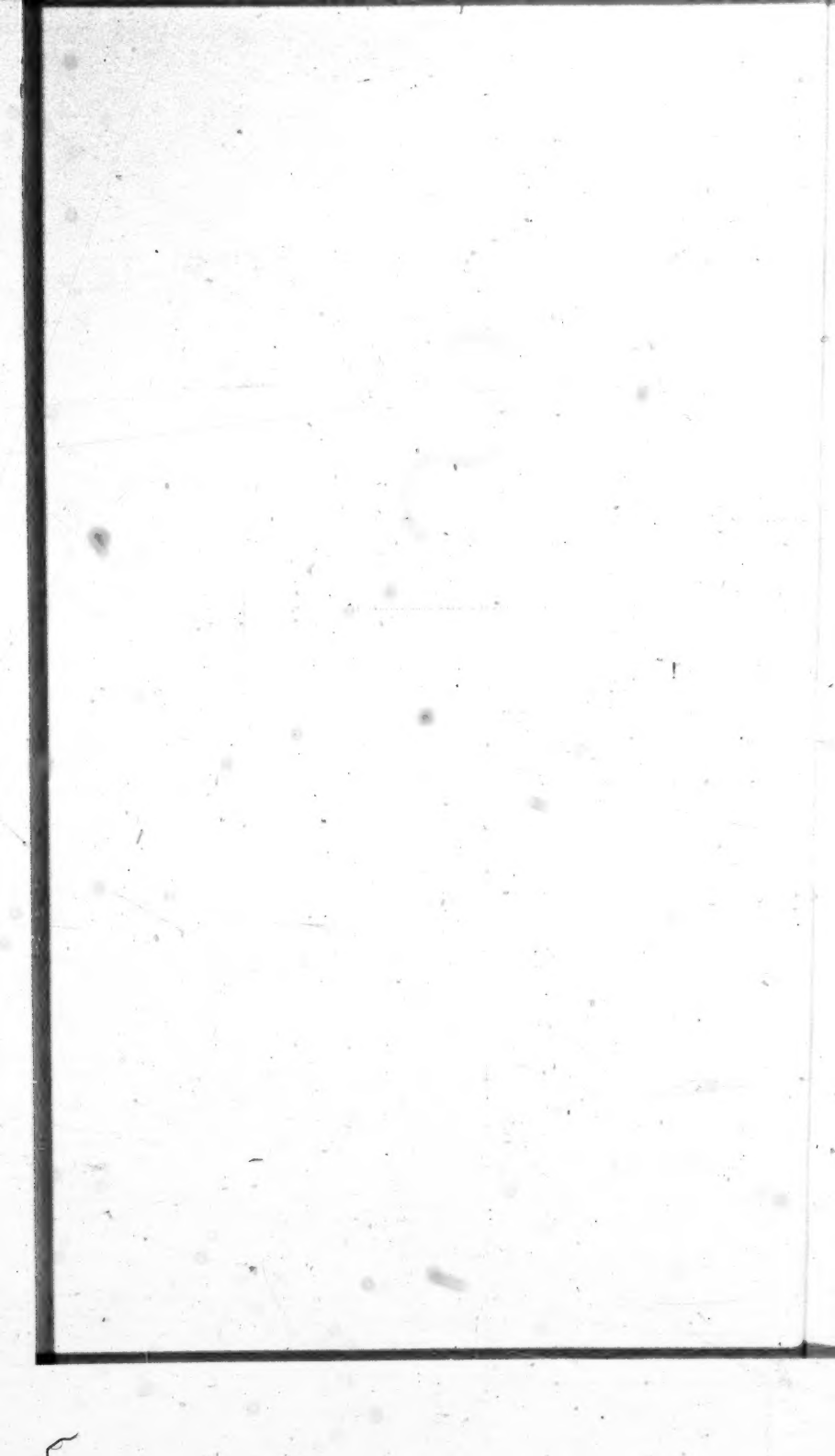
**CHRISTENFIELD COUNTY SCHOOL BOARD
AND DR. ROBERT F. KELLY, *Respondents*.**

**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

PETITION FOR CERTIORARI FILED FEBRUARY 14, 1973
CERTIORARI GRANTED APRIL 23, 1973

TABLE OF CONTENTS

	<i>App. Page</i>
Complaint	1
Motion To Dismiss	7
Answer	8
Memo Of Court Dated January 19, 1971	10
Order Denying Motion To Dismiss Dated January 19, 1971	10
Stipulation Of Facts	13
Memo Of Court Dated May 17, 1971	14
Final Decree Dated May 17, 1971	19
Plaintiff's Exhibit No. 10, pp. 16-17	20
Plaintiff's Exhibit No. 6—Letter Of Dr. David C. Forest 10/22/70	21
Plaintiff's Exhibit No. 7—Minutes Of Board Meeting 11/11/70, p. 1; para. 3-5	22
Plaintiff's Exhibit No. 8—Minutes Of Board Meeting 11/25/70 p. 2; para. 1	23
Deposition Of Dr. Leo J. Dunn Dated April 14, 1971 ..	23
Deposition of C. Douglas Spencer, et al, 3/16/71	37
Trial Proceedings—April 19, 1971	65
Docket Entries For The Court Of Appeals For The Fourth Circuit	125



United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 71-1707

MRS. SUSAN COHEN,

Appellee,

v.

CHESTERFIELD COUNTY SCHOOL BOARD, et. al.

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA,
RICHMOND DIVISION

COMPLAINT

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1343 (3). This suit is in equity for injunctive relief and damages authorized and instituted pursuant to 42 U.S.C. Section 1983. The jurisdiction of this Court is invoked to secure the protection of civil rights and to redress the deprivation of rights, privileges and immunities secured by the Fourteenth Amendment of the Constitution of the United States and Title VII of Public Law 88-352 known as the Civil Rights Act of 1964.

2. Plaintiff, Susan Cohen, is a social studies teacher employed by the Chesterfield County School Board in Chester-

App. 2

field County in the State of Virginia. At the present time, she teaches classes in Senior Government at Midlothian High School in Chesterfield County. She is a citizen of the State of Virginia and of the United States.

3. Defendant, Chesterfield County School Board, is the body vested by Article IX, Section 133 of the Constitution of the State of Virginia with the authority for the establishment and operation of public schools for the citizens of Chesterfield County. The School Board has primary authority over the hiring and termination of employment of teaching personnel in Chesterfield County Schools.

4. Defendant, Dr. Robert F. Kelly, is Division Superintendent of the Chesterfield County School Board. He is charged with authority to administer and regulate the affairs of Chesterfield County Schools. Dr. Kelly is, by information and belief, a citizen of the State of Virginia and of the United States.

5. On May 15, 1970, plaintiff and defendant Chesterfield County School Board entered into an employment contract for the services of plaintiff as a teacher in the Social Studies Department at Midlothian High School in Chesterfield County for the period of August, 1970 through June, 1971. In Clause 3 of this contract plaintiff agreed to comply with all school laws, State Board of Education regulations, and all rules and regulations made by defendant School Board in accordance with law and State Board of Education regulations and shall make promptly and accurately all reports required by the division superintendent. [Original attached]

6. On or about October 28, 1970, plaintiff sent a letter to defendant School Board as required by Paragraph 5(a) of "Absentee and Sick Leave Policy" of the Personnel Policy Manual of the Chesterfield County School Board and by

App. 3

Clause 3 of her contract with defendant. In this letter, plaintiff informed defendant school Board that she was pregnant and that her due date was on or about April 28, 1971. Plaintiff requested that her maternity leave take effect on April 1, 1971.

7. On November 6, 1970, Mr. G. H. Bruce, Jr., Director of Secondary Personnel for the Chesterfield County School Board wrote plaintiff that her employment as a school teacher would be terminated as of December 18, 1970. [Original attached]

8. At this point, plaintiff would be in her fifth month of pregnancy.

9. On November 16, 1970, Mr. Bruce informed plaintiff in writing that the School Board had considered her case at its November 11, 1970 meeting and had denied her request that her termination date be extended until April 1, 1971. [Attached]

10. On November 18, 1970, plaintiff spoke via telephone with defendant Dr. Robert F. Kelly, and plaintiff requested an appearance before the School Board regarding the termination of employment. Dr. Kelly told her that she may appear at the November 25, 1970 meeting.

11. On November 25, 1970, plaintiff appeared before defendant School Board. After presenting letters from her gynecologist, Dr. Frank S. Knight, M.D. and her principal, Mr. John R. Kopko that her termination date be extended beyond the December 18th deadline, plaintiff was told orally by the School Board that her request had been denied.

12. In notifying defendants in writing of her pregnancy, plaintiff fully complied with the rules and regulations of the School Board.

App. 4

13. Plaintiff's request for maternity leave was ineffective since under Paragraph 5 (c) (1) of the Absentee and Sick Leave Policy, maternity leave "must be requested in writing at the time of termination of employment." [Copy attached]

14. Under the School Board regulations, Paragraph 5 (c) (1), maternity leave can be requested and considered only after the employment of plaintiff has been terminated. Therefore, the termination of plaintiff's employment represented an arbitrary dismissal of her services rather than an acceptance of her resignation or a placement of plaintiff on maternity leave.

15. In terminating the employment of plaintiff, defendants have denied plaintiff the right to due process of law as secured by the Fourteenth Amendment to the Constitution of the United States and by the Code of the State of Virginia.

16. Plaintiff was not given written notice or notice by personal interview of the reasons for dismissal and her right to request a hearing before the School Board as required by Section 22-217.6 of the Code of Virginia.

17. Plaintiff was not allowed to appear at the November 12, 1970 School Board meeting where her case was considered, nor was she told of her right to have counsel present at such hearing.

18. Plaintiff was not given at least 15 days written notice of the time and place of either the November 12, 1970 or November 25, 1970 School Board meetings as required by Section 22-217.7 of the Code of Virginia.

19. Plaintiff was not given written notice of the decision of the School Board and a transcript of the School Board meeting as required by Section 22-217.8 of the Code of Virginia.

App. 5

20. In terminating the employment of plaintiff, defendants have exceeded their authority under Section 22-217.5 of the Code of Virginia which prescribes the grounds for dismissal of a teacher: "Teachers may be dismissed for the following reasons: incompetency, immorality, noncompliance with the school laws and regulations, disability as shown by competent medical evidence, or for other good and just cause."

21. Defendants have made no showing that the fact that plaintiff is more than 5 months pregnant will in any manner affect her capability or performance as a teacher or in any manner be detrimental to the students or school itself. By arbitrarily terminating plaintiff's employment on the sole basis that she is pregnant, defendants have violated plaintiff's right to due process and equal protection of the law as secured by the Fourteenth Amendment to the Constitution of the United States.

22. The regulation of the School Board of Chesterfield County that the termination of an expectant mother shall become effective at least four months prior to the expected birth of the child is arbitrary and discriminatory against plaintiff and women in general. This regulation prescribes grounds for discharge based on conditions of sex alone and does not require any showing of just cause or reason that a pregnant woman is incapable of performing her functions of employment as a school teacher. This discrimination on the basis of sex is an unfair employment practice under the provisions of Title VII of Public Law 88-352 known as the "Civil Rights Act of 1964."

23. This discrimination is carried on under color of state law and under color of custom and usage required and enforced by officials of the State of Virginia and political sub-

App. 6

divisions thereof. Such discrimination by defendants has deprived plaintiff of her right to due process and equal protection of the laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States and constitutes a deprivation of plaintiff's liberty and property as secured by the Fourteenth Amendment.

24. Plaintiff has no plain, adequate or complete remedy at law to redress the wrongs alleged herein, and this suit for an injunction and declaratory judgment is the only manner of securing adequate relief. Plaintiff is now suffering and will continue to suffer irreparable injury from defendants' acts or policy of discrimination and denial of due process unless relief is provided by this court.

25. By virtue of defendants' acts, plaintiff will suffer irreparable harm and injury. Plaintiff will lose her employment status as a school teacher, and at this late date in the school year she will be unable to find other similar employment.

26. Furthermore, when she is forced to leave teaching on December 18, 1970, plaintiff will lose a full year of teaching credit which she would be due had she been allowed to complete the semester and continue teaching for at least one day thereafter. This loss of teaching credit will deprive plaintiff of incalculable funds during the course of her teaching career and will impede her chances of future advancement and promotion.

WHEREFORE, plaintiff respectfully prays that the court enter judgment for plaintiff as follows:

1. Granting plaintiff an injunction enjoining defendants, their agents, employees, successors, and those acting in concert with them from terminating the employment of plaintiff arbitrarily on the grounds that she is pregnant and requiring that plaintiff be permitted to remain in her position as a

App. 7

teacher until such time as her gynecologist shall deem that she is physically unable to continue to teach.

2. Ordering defendants to compensate plaintiff for any salaries lost until such time as plaintiff is restored to her position as a school teacher at Midlothian High School in Chesterfield County, Virginia.

3. Ordering defendants to pay and reimburse plaintiffs for court costs and expenditures and reasonable counsel fees.

4. Granting plaintiffs such other and appropriate relief as the court may deem proper.

MRS. SUSAN COHEN
By Counsel

**MOTION TO DISMISS, PRESENTING DEFENSES
OF LACK OF JURISDICTION AND FAILURE TO
STATE A CLAIM UNDER RULE 12(b)**

Come now the defendants, and each of them, by counsel, who move this Honorable Court as follows:

1. To dismiss the action on the ground that the court lacks jurisdiction over the subject matter because the sole basis of the complaint is founded upon a contract entered into voluntarily between the parties to this action and said contract does not abridge or violate any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress.

2. To dismiss the action on the ground that the complaint fails to state a claim against the defendants upon which relief can be granted.

Attorney for Defendants
P. O. Box 25
Chesterfield, Virginia 23832

ANSWER PRESENTING AFFIRMATIVE DEFENSES

Come now the defendants, and each of them, by counsel, and as and for their answer presenting affirmative defenses to the complaint exhibited against them by the plaintiff allege and say:

1. That they deny the allegations set forth in paragraph 1 of the complaint and in defense thereof say that the subject matter of this suit is founded upon a contract voluntarily entered into between the parties.

2. That they admit the allegations set forth in paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the complaint except that they deny that notice in writing constitutes "full compliance" with the rules and regulations of the School Board as alleged in paragraph 12 and in further answer to said allegations defendants deny that said allegations raise a constitutional question.

3. That they deny the allegations set forth in paragraph 13 of the complaint and in defense thereof say that plaintiff's request for maternity leave was granted by administrative action pursuant to the terms and conditions of plaintiff's contract of employment with the School Board and said leave is in full force and effect. Said paragraph sets forth conclusory allegations unsupported by facts and does not raise a constitutional question.

4. That they deny the allegations set forth in paragraph 14 of the complaint and in defense thereof say that maternity leave may be requested in writing at any time up to and including the effective date of termination of employment as provided by the contract and the rules thereunder. Said paragraph sets forth conclusory allegations unsupported by facts and does not raise a constitutional question.

5. That they deny the allegations set forth in paragraphs 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26 of the complaint and in defense thereof say that plaintiff's maternity leave was granted and became effective automatically under and by virtue of the terms and conditions of her contract because of pregnancy and not otherwise, as a matter of law; that Sections 22.217.5, 22.217.6, 22.217.7 and 22.217.8 of the Code of Virginia (1950), as amended, have no application to the facts well pleaded in this case and the facts alleged are totally inadequate to invoke said sections as a matter of law; that pregnancy does not constitute a ground for dismissal under any of the aforesaid sections as a matter of law; that by execution of the contract plaintiff expressly and impliedly accepted the benefits extended her under the maternity leave provisions of the contract and accepted the restrictions imposed therein as a matter of law; that in executing the contract plaintiff waived such constitutional rights, if any, that do or may run counter to the terms and conditions of her contract as a matter of law; that the maternity leave provisions of the contract are and represent a special benefit accorded to and enjoyed only by those teachers who become pregnant during the course of their teaching contract as a matter of law; that the maternity leave provisions of the contract are reasonable and based on reasonably calculable physical changes certain to occur in women who become pregnant; and the rules and regulations complained of do not have the force and effect of law and their enforcement is dependent upon a violation or breach of contract none of which are alleged or otherwise evident in this case as a matter of law.

6. That the complaint fails to state a claim against the defendants upon which relief can be granted.

WHEREFORE, the defendant, and each of them respect-

fully pray that the complaint exhibited against them be dismissed and that they be allowed to go hence with their costs and expenses in hand paid.

**ORDER
DENYING DEFENDANT'S MOTIONS**

In accordance with the memorandum of the Court this day filed, it is **ADJUDGED** and **ORDERED** that the Motion to Dismiss for lack of jurisdiction, the Motion to Dismiss under Fed. R. Civ. P. 12(b)(6), 28 U.S.C., and the Motion to Strike be, and the same are hereby, denied.

Let the Clerk send copies of the memorandum and this order to counsel of record.

/s/ ROBERT H. MERTIGE, JR.
United States District Judge

MEMORANDUM

The plaintiff seeks to permanently enjoin the defendants from forcing her to take a leave of absence from her duties as a teacher at Midlothian High School in Chesterfield County after her fifth month of pregnancy. She also seeks damages for any loss she may suffer as a result of the leave of absence.

The defendants filed a Motion to Dismiss based on an alleged lack of jurisdiction over the subject matter of the suit, and for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b), 28 U.S.C. The motions were taken under advisement, and a Motion for a Preliminary Injunction on behalf of the plaintiff was denied. Since that time, the defendants have answered the complaint and filed a Motion to Strike certain paragraphs of the complaint.

The plaintiff contends that the Court has jurisdiction over

App. 11

the cause under 28 U.S.C. § 1343(3).¹ The defendants maintain that the cause of action is strictly based upon the contract between the parties, and that no constitutional claim is presented. However, the plaintiff has raised in the complaint that she has been discriminated against in such a manner as to deprive her of due process and equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The defendants cite *Pierce v. Somerset Railway*, 171 U.S. 641 (1898), for the proposition that an individual may waive a constitutional right. However, the framers of the Constitution never intended for such a waiver to take place unwittingly, and the mere signing of a contract cannot constitute a waiver of rights protected by the Constitution of the United States.²

Therefore, this Court has jurisdiction over the matter in question under 28 U.S.C. § 1343(3).

The defendants have also moved this Court to dismiss the suit on the ground that no claim has been presented upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). The plaintiff claims entitlement to relief under 42 U.S.C. § 1983.³

1. § 1343. Civil Rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

2. It is interesting to note that in one of the clauses of the contract in question Mrs. Cohen swore allegiance and loyalty to the Constitution of the United States. It seems incongruous that the defendants now seek to maintain that the act of signing the document amounted to a waiver of certain rights under that constitution to which the plaintiff swore allegiance and loyalty.
3. § 1983. Civil action for deprivation of rights

The plaintiff contends that the defendants, acting in their official capacity, have caused her to be deprived of rights guaranteed by the Constitution of the United States. If that contention is correct this Court has the power to order the appropriate relief under 42 U.S.C. § 1983. Thus, the Motion to Dismiss under Rule 12(b)(6) will also be denied.

Finally, the defendants have moved to strike paragraphs 13 through 23 inclusively of the complaint "on the ground that they are and represent bare conclusory allegations not supported by material facts necessary to create a genuine issue and they do not raise constitutional questions." Fed. R. Civ. P. 12(f).

Matter will not be stricken from a pleading unless it is clear that it can have no possible bearing upon the subject matter of the litigation. *Augustus v. Board of Public Instruction*, 306 F. 2d 862, 868 (5th Cir. 1962). The motion to strike should be granted only when the pleading to be stricken has no possible relation to the controversy. *Brown & Williamson Tobacco Corp. v. United States*, 201 F. 2d 819, 822 (6th Cir. 1953).

These statements show the severity with which the courts treat a Motion to Strike. Such a test precludes the striking of the instant paragraphs complained of by the defendants. Therefore, the Motion to Strike will be denied.

An order consistent with the above memorandum will be entered.

/s/ ROBERT R. MERHIGE, JR.
United States District Judge

January 19, 1971.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STIPULATION OF FACTS

As and for the defendants' stipulation of the facts in this case, which the plaintiff will not be expected to prove and with the right hereby expressly reserved to introduce evidence and rely upon all additional relevant facts as they develop in the trial of this case, stipulates as follows:

1. That plaintiff is an employee of the Chesterfield County School Board.

2. That plaintiff was first employed as a school teacher by the Chesterfield County School Board for the 1968-1969 school year under and pursuant to the terms and conditions of an employment contract as required by law.

3. That plaintiff was re-employed by the Chesterfield County School Board for the 1969-1970 school year and again re-employed for the 1970-1971 school year under similar, but not identical, contracts as above.

4. That several weeks prior to the effective date of the latter mentioned contract, plaintiff became pregnant and subsequently, on or about November 2, 1970, plaintiff informed the defendant by letter that she was pregnant. She notified the defendant that the estimated due date was April 28, 1971, and she asked that maternity leave be made effective as to her on April 1, 1971, which would be the end of her eighth month of pregnancy.

5. That plaintiff's maternity leave was granted by the defendant effective December 18, 1970, pursuant to the terms and conditions of the maternity leave policy. That plaintiff's request for maternity leave becoming effective April 1, 1971, was denied.

6. That plaintiff requested permission to present her case before the defendant school, which permission was granted

and plaintiff did present her case for extension of time to the defendant school board at their meeting on November 25, 1970. Her request was refused by the school board.

7. That at the time of plaintiff's first employment contract, 1968-1969, she was given a full year's teaching credit for less than a full year's teaching experience.

8. That plaintiff is considered by defendant school board to be an excellent teacher.

Respectfully submitted,
CHESTERFIELD COUNTY SCHOOL BOARD,
et al., Defendants

By _____
of Counsel

MEMORANDUM

Mrs. Susan Cohen, the plaintiff in the above-styled action, complains that a regulation of the Chesterfield County School Board (School Board) which requires her to take a leave of absence from her duties as a teacher in Midlothian High School at the end of her fifth month of pregnancy violates her constitutional rights in that it discriminates against her as a woman, thereby violating the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.¹ Dr. Robert F. Kelly is Superintendent of the Chesterfield County schools. Jurisdiction is

1. The applicable provision reads, in relevant part, as follows:

Termination of employment of an expectant mother shall become effective at least four (4) months prior to the expected birth of the child. Termination of employment may be extended if the superintendent receives written recommendation from the expectant mother's physician and her principal, and if the superintendent feels that an extension will be in the best interest of the pupils and school involved.

App. 15

invoked under 28 U.S.C. § 1343(3), the contention being that defendants' actions violate 42 U.S.C. § 1983.

Mrs. Cohen was first employed as a school teacher by defendant School Board for the 1968-69 school year under and pursuant to the terms and conditions of an employment contract as required by law. She was re-employed by the School Board for the 1969-70 school year and again in 1970-71, under similar, but not identical contracts.²

On or about November 2, 1970, Mrs. Cohen informed the School Board in writing that she was pregnant.³ She stated that the estimated due date was April 28, 1971, and, with the consent of her obstetrician, asked that maternity leave be made effective as to her on April 1, 1971, which would be the end of her eighth month of pregnancy. Leave was granted effective December 18, 1970, pursuant to the terms and conditions of the maternity leave policy,⁴ and her request that April 1, 1971, be the effective date was denied.

Mrs. Cohen requested permission to present her case before the School Board, which she did on November 25, 1970.⁵ The Board denied her request for an extension.⁶ The basis was that even though she was, and is, considered to be an excellent teacher, the School Board had a replacement available, and felt it proper to abide by its regulation.

2. She had not yet attained continuing contract status.

3. This was in accordance with the provision that notice of pregnancy must be given the School Board at least six months prior to the date of the expected birth.

4. *fn. 1, supra*. Such leave is not a dismissal. See Va. Code Ann. 22-217.5 (1969 Repl. Vol.). Mrs. Cohen has the right to be re-employed by the School Board at a time when she determines she is physically fit and the School Board is able to place her.

5. Mrs. Cohen's principal had previously requested that she be allowed to teach until the end of the first semester, January 21, 1971.

6. A similar request had been presented by two teachers at the Board meeting of November 11, 1970, and was also denied.

The unrefuted medical evidence is that there is no medical reason for the Board's regulation. As a matter of fact, pregnant women are more likely to be incapacitated in the early stages of pregnancy than the last four months.⁷ Further, there is no psychological reason for a pregnant teacher to be forced to take a mandatory leave of absence. In short, since no two pregnancies are alike, decisions of when a pregnant teacher should discontinue working are matters best left up to the woman and her doctor.

In addition, no tenable administrative reason has been advanced by the defendants in defense of the provision. The reasons given by Dr. Kelly and the members of the School Board for the policy, such as fear of pushing with resulting injury to the fetus, and inability to carry out responsibilities in fire drills, are nugatory, and based on no empirical data whatsoever. Neither has there been a substantial study conducted upon which to base the contention that absences will increase during the latter stages of pregnancy. Basically, the four month requirement set forth in the provision was arbitrarily selected.

Mrs. Cohen seeks by way of relief to be placed in the same status she would have been in had she been allowed to teach until April 1. That includes wages from January, 1971, through March, 1971, and all other rights and benefits accorded teachers in the Chesterfield school system, including, but not limited to, seniority.

In 1905, the Supreme Court held that a New York law fixing maximum hours that an employee could work was violative of the Constitution in that it interfered with the right to contract. *Lochner v. New York*, 198 U.S. 45 (1905).

7. Mrs. Cohen missed approximately ten days during the semester she taught. However, those absences were due to religious holidays and illnesses unrelated to her pregnancy.

However, less than three years later, in *Muller v. Oregon*, 208 U.S. 412 (1908), the Supreme Court restricted the meaning of *Lochner* to men, *Id.* at 418-19, and held that a law restricting working hours for women was reasonable due to the difference between the sexes. See also, *Bosley v. McLaughlin*, 236 U.S. 335 (1915); *Miller v. Wilson*, 236 U.S. 373 (1915); *Riley v. Massachusetts*, 232 U.S. 671 (1914). The Court later held, under the same theory, that minimum wage laws for women were valid. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). Thus, the Supreme Court had established a principle that legislation could, in certain instances, validly prescribe different treatment for men and women.

In 1948 an equal protection argument was first put forth to the Supreme Court. *Goesaert v. Cleary*, 335 U.S. 464 (1948). The plaintiffs contended that a Michigan statute prohibiting women from being licensed as bartenders, except wives and daughters of male owners, violated the equal protection clause of the Fourteenth Amendment. The Court upheld the statute, stating that under the facts presented it was reasonable. *Id.* at 466. However, Mr. Justice Frankfurter, speaking for the Court, stated that "[t]he Constitution in enjoining equal protection of the laws upon States precludes irrational discrimination as between persons or groups of persons in the incidence of a law." *Id.* Thus, though absolute equality is not required, *Douglas v. California*, 372 U.S. 353, 357 (1963), distinctions which are "irrational,' 'irrelevant,' 'unreasonable,' 'arbitrary,' or 'invidious,'" cannot be drawn. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 673-74 (1963) (Black, J., dissenting).

The defendants, whose actions constitute state action, have attempted to argue that the instant case is simply a matter of contract between parties. They contend that Mrs. Cohen,

in signing the contract of employment, waived her constitutional rights. This argument has been made and rejected previously by the Court. *Cohen v. Chesterfield County School Board*, Civil Action No. 678-70-R, mem. decis. (E.D. Va., Jan. 19, 1971). Therefore, the question to be answered is what rights, as a public employee, does Mrs. Cohen have. "It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute for regulation is patently arbitrary or discriminatory." *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952). See also *Keyisbian v. Board of Regents*, 385 U.S. 589 (1967).

The maternity policy of the School Board denies pregnant women such as Mrs. Cohen equal protection of the laws because it treats pregnancy differently than other medical disabilities. Because pregnancy, though unique to women, is like other medical conditions, the failure to treat it as such amounts to discrimination which is without rational basis, and therefore is violative of the equal protection clause of the Fourteenth Amendment. See *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959); *Morey v. Doud*, 354 U.S. 457 (1957).

The defendants attempt to justify the policy on the ground that the five month rule is well within the lines of other school boards in the State of Virginia. However, similar treatment of a certain class in other school districts cannot be used to show that a certain policy has a rational basis. Rather, the Court must determine whether the classification drawn in the regulation, in light of its purpose, serves any rational purpose. Otherwise, it is arbitrary or invidiously discriminating. *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964).

Hence, the maternity leave policy in question is discriminatory within the proscription of the equal protection clause of the Fourteenth Amendment to the Constitution of the

United States. Mrs. Cohen is entitled, therefore, to be put in the same position she would have been in had she been allowed to teach until April 1, 1971, as she requested. Such relief includes recovery of her salary for the months of January, February and March 1971, seniority to which she is entitled,* and any and all other rights and benefits she would have received had she been teaching during that period.

An appropriate order will enter.

/s/ ROBERT R. MERIHIGE JR.
United States District Judge

Date: May 17, 1971

ORDER

In accordance with the memorandum of the Court this day filed, it is ADJUDGED and ORDERED that:

1. The maternity leave provision of the Chesterfield County School Board does violate the plaintiff's constitutional rights in that it deprives her of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

2. Therefore, the plaintiff shall receive all rights and benefits to which she would have been entitled, including, but not limited to, her full salary for the months of January, February and March, 1971, and seniority credit for the fall semester of the 1970-71 school term.

8. Had Mrs. Cohen been allowed to teach she would have completed the full semester, and is therefore entitled to seniority credit for that period. However, on her own, she sought leave during the spring semester and is therefore not entitled to seniority credit for that semester since the School Board requires completion of a semester in order to attain seniority for the period. Thus, she receives a half year's seniority credit.

3. Further, the plaintiff shall not be deprived of any rights and benefits to which she is entitled at the expiration of her now commenced maternity leave, including, but not limited to, reemployment.

Let the Clerk send copies of the memorandum and this order to counsel of record.

/s/ ROBERT R. MERTIGE JR.
United States District Judge

Date: May 17, 1971

PLAINTIFF'S EXHIBIT 10

[pp. 16-17]

5. MATERNITY PROVISIONS

a. Notice in writing must be given to the School Board at least six (6) months prior to the date of expected birth.

b. Termination of employment of an expectant mother shall become effective at least four (4) months prior to the expected birth of the child. Termination of employment may be extended if the superintendent receives written recommendations from the expectant mother's physician and her principal, and if the superintendent feels that an extension will be in the best interest of the pupils and school involved.

c. Maternity Leave

(1) Maternity leave must be requested in writing at the time of termination of employment.

(2) Maternity leave will be granted only to those persons who have a record of satisfactory performance.

(3) An individual will be declared eligible for reemployment when she submits written notice from her physician that she is physically fit for full-time employ-

App. 21

ment and when she can give full assurance that care of the child will cause minimal interference with job responsibilities.

(4) Re-employment will be guaranteed no later than the first day of the school year following the date that the individual was declared eligible for re-employment.

(5) All personnel benefits accrued, including seniority, will be retained during maternity leave unless the person concerned shall have accepted other employment.

(6) The school system will have discharged its responsibility under this policy after offering re-employment for the first vacancy that occurs after the individual has been declared eligible for re-employment.

PLAINTIFFS EXHIBIT 6

**DR. DAVID C. FORREST
DR. FRANK S. KNIGHT**

**MONUMENT MEDICAL BUILDING
4908 MONUMENT AVENUE
RICHMOND, VIRGINIA 23230**

TO WHOM IT MAY CONCERN:

**Re: Mrs. Leo Cohen
(Susan)**

This is to certify that the above captioned patient is under my professional care for pregnancy. She has my permission to work at her regular job as long as she desires.

If any further information is needed, please feel free to call this office.

Very truly yours,

/s/ David C. Forrest, M.D.

DCF:ikg

PLAINTIFF'S EXHIBIT 7

November 11, 1970

A regular meeting of the Chesterfield County School Board was held this evening at 8 o'clock in the board room of the School Administration Building.

Mrs. Barbara Westerhouse and Mrs. Sherrie Bowman, teachers at the Falling Creek Elementary School, appeared before the board asking that the policy on maternity leave be reconsidered thereby allowing them to remain in their present position beyond the limit as set by the policy. (The resignation date on both teachers had been set at Dec. 18, 1970—they were asking that the date be extended through Jan. 22, 1971).

Mr. Gordon brought the board up to date on these two cases and stated that he felt that the regulation was entirely reasonable. However, he said that if there was a very good reason for extension in terms of benefit to pupils and the good of the system, etc., then he would certainly recommend it. Otherwise, he felt we should adhere to the policy. Mrs. Stoncham, Director of Elementary Personnel, was present and assured the board that qualified teachers were readily available to fill these two positions at the Dec. resignation date. The superintendent also recommended that we stay within the policy.

The chairman then stated that the child was the main concern of the school board, and if the staff could not locate qualified replacements, then the board would certainly want to make an exception and extend the time. On the basis of the information presented, it was the consensus of the board that the policy not be changed on maternity leave. Mr. Crump did add that it might be well to review the policy at the end of this school year, and if it was found necessary, then appropriate changes would be made.

PLAINTIFF'S EXHIBIT 8

11/25/70

Mrs. Susan Cohen, a teacher at the Midlothian High School, appeared before the board requesting an extension of her resignation date from December 18, 1970, to January 22, 1971. According to present board policy on pregnancy, Mrs. Cohen's last date of employment was set at December 18; however, she was asking that she be allowed to finish out the semester in view of the short time involved, her good health to date, and the fact that students and parents wanted her. The board listened intently and sympathized with Mrs. Cohen, but the chairman explained that it was impossible to make a policy that would suit everyone, and if the present policy is not adequate, then the board would surely review it at the end of this school year. The board then, on motion of Mr. Russell, denied Mrs. Cohen's request for extension.

DEPOSITION OF DR. LEO J. DUNN

[TR. PP. 4-12]

Q Dr. Dunn, please state your name and address.

A Leo J. Dunn, Medical College of Virginia, which is 1200 East Broad Street, Richmond, Virginia.

Q Please state your current position.

A Professor and Chairman of Obstetrics and Gynecology for the Medical College of Virginia.

Q Dr. Dunn, what are the different type of illnesses that might occur during the term of pregnancy to a woman that might affect her working capabilities?

A Well, a pregnant woman is not immune to any diseases that a woman of the same age would be subject to, so that she would be subject to any of these diseases. As far

as special disorders in pregnancy there would be a few, and the major ones would be: toxemia pregnancy, anemia and then hemorrhagic condition related to placenta or what is commonly called the after-birth.

Q At what stage of a woman's pregnancy do these problems occur?

A Usually in the last few months.

Q What about such problems as morning sickness?

A Well, we don't usually regard these as illnesses, unless they are extreme. They are considered symptoms of pregnancy. These usually occur, the morning sickness particularly occurs in the first few months of pregnancy.

Q What other symptoms of pregnancy are there that occur?

A Ordinary symptoms of pregnancy, early pregnancy would be the nausea, breast changes with enlargement and engorgement of the breasts, and constipation. These are the three major symptoms that women have in the first part of pregnancy.

Q Do these symptoms usually disappear?

A After the first 12 weeks it is uncommon to have these symptoms. Then later in pregnancy they will ordinarily have some edema or swelling of the legs, which is usually minimal. They will have some backache occasionally, related to the change in their body contour with change in the center of gravity, and that is about the major things.

Q The disease conditions you mentioned, I believe toxemia, anemia and hemorrhagic condition, these are disease conditions such that would require hospitalization?

A Yes.

Q These could be diagnosed by a doctor by examination?

A Yes.

Q Dr. Dunn, are there any medical or physical conditions that are certain to occur in a woman during her last four months in pregnancy that would render her incapable of working in an occupation such as a teacher?

A No, I don't think so.

Q Do you believe that a woman who is undergoing a normal pregnancy and under a doctor's care and supervision should be required by her employer to stop working at the end of her fifth month of pregnancy?

MR. MASON: I object to that question. It calls for a conclusion which goes to the issue of the reasonableness rule, and is the decision that the Court itself has to make.

You may go ahead and answer.

A No, I don't think that this is any reason for them to have to discontinue work of this sort.

Q What do you base that opinion on?

A Well, our policy and our own practice has been not to advise patients to discontinue work.

MR. MASON: I object to the last question for the same reason.

A In that they have had no difficulty in maintaining their work. If they find that the combination of pregnancy and their ordinary work is fatiguing, then they can request a leave. But this is not, we don't find this to be very common.

Q Would you consider the job of a teacher, who teaches classes of 11th and 12th grade children in the same classroom, and on the first floor of a school building, and with a schedule such as a 20 minute homeroom period, three 50-minute classes with 5 minute breaks in between, and then a 50-minute period of free time, and then 40 minute lunch

break, and then two afternoon classes of 50 minutes are particularly strenuous occupation that would require special treatment for a teacher if she was pregnant?

A Well, I wouldn't think so, from what you described. You described a very ordinary work day, and I would say that most pregnant women would be able to handle that pretty well.

Q What would you consider a strenuous occupation that might require a woman to be laid off if she was pregnant?

A Well, the things that we would be concerned about would be mainly those occupations that would expose the person to hazardous conditions; that is, noxious gases or something like that where they would be more clear cut as to whether this might be harmful to the fetus, since these gases might get into the bloodstream. Also I would say that any occupation where it would be necessary for them to have a good sense of balance; where they would be subject to falling and this sort of thing, since they, as they increase in pregnancy they become unbalanced with the change in body contour; then we would be concerned about that. And then long periods of standing still, I would think would be uncomfortable to them, but I don't think it would be hazardous to them, just because of the weight of the fetus and all that.

Q Would the fact that a woman who is teaching, was forced to walk up and down hallways with children in the hallways, would this be considered a hazard to her health because of her problem with equilibrium?

A No, I don't think that would be a hazard.

Q In other words, this would be something in the ordinary term?

A She should be no more subject to any particular prob-

lem than she would be going shopping or walking along the street or something like that.

Q From a psychological standpoint of pregnancy, isn't it better for the pregnant woman to have some sort of employment or occupation during her period of pregnancy?

A I don't think I could say that categorically. I think that is really a very individual thing. I think some people are glad to retire early, and some people aren't. I don't think psychology has a lot to do with it.

Q Do you believe that a pregnant woman who has not had any real problems during her first five months of pregnancy would miss any more time from her work during the latter four months of pregnancy?

A I don't see any reason why they would necessarily have to. Now, of course, these are people who have to have regular doctor visits. This is programmed, that they have to make so many doctor visits. It just depends on how these are scheduled, whether it will interfere with their work.

Q Dr. Dunn, would you consider pregnancy as a special condition that would require such special treatment from a woman's employer? Should pregnancy be treated as any condition that might affect the working capabilities of the woman?

A Barring those things I have mentioned where they would be exposed to hazardous conditions, I think that they should not necessarily require special treatment.

Q What person do you believe is best able to judge at what stage of pregnancy a woman should stop working?

MR. MASON: I object to that question. It calls for a legal conclusion which the Court itself has to make in this case.

Q Would you like for me to repeat the question?

A Yes. The question was who is best able to make the judgment as to when a person must discontinue working?

Q Right.

A I suppose ultimately it is the individual herself who would decide best in terms of her own family needs and whatnot as to when she would discontinue working. Pregnancy, as far as condition of health, I suppose that would be a medical decision.

Q Do you feel that a policy that prevents women from working beyond their fifth month of pregnancy is of benefit to the woman?

MR. MASON: I object to that question for the same reasons as before, it calls for a legal conclusion which the Court itself must decide.

A I wouldn't regard it—You are saying now is it benefit to the woman if it is mandatory—

Q Right.

A —the time of quitting work? I wouldn't think that it is of particular benefit to the individual not to have a choice.

Q What type of policy would you prefer to be in effect?

MR. MASON: I object to that question for the same reasons as stated previously.

A Well, I think that in non-hazardous circumstances that it is better for the patient, and working with her physician, to decide when she should discontinue work. This is really pretty much the policy we follow with our practice. If we find anything as far as we are concerned, the patient ought to have a more sedentary life, then we recommend that they discontinue work. The majority of our patients, though, work right up to the time they go into labor. As an example of that, one of our office personnel in our private practice

went into labor while she was working yesterday and delivered this morning. We follow through on this. And she had no difficulty maintaining her occupation routine during that time.

Q How many patients do you usually see in your private practice?

A Our practice at the Medical College right now, with a full time staff, is about 160 deliveries a year.

* * *

[DEP. PP. 14-15]

A Well now, swelling is not a health problem. It is a physiologic change with pregnancy. The abnormal swelling would be related to the toxemia pregnancy that I mentioned before.

The ordinary diseases of this age group occur by and large with the same frequency with pregnancy as without except perhaps for the occurrence of urinary tract infections which is somewhat increased in pregnancy.

Q Generally when a condition of this type prevails in a pregnant woman, what do you generally prescribe?

A Urinary tract infections?

Q No, swelling.

A If it is normal swelling of pregnancy, that is physiologic swelling. We don't treat that, ordinarily. If it just a physical finding. Because it is anticipated, and it is not pathologic. If it is swelling related to toxemia, and it is also associated with blood pressure rise and changes in the urinary findings, then those patients are hospitalized.

Q They are hospitalized?

A Yes.

Q Can this condition occur in any pregnant patient?

A It is more likely to occur under certain circumstances. There are certain people who are more likely to have toxemia than others.

Q Would it be safe to assume that no pregnant woman is immune from it?

A I think that is safe to say. I think there are categories of pregnant women who would have very low susceptibility, some would have very high susceptibility.

Q Can this occur during any stage of the pregnancy?

A No. Your toxemia pregnancy is, by definition does not occur before 24 weeks of pregnancy, and is uncommon until after 30 weeks of pregnancy and thereafter increases in its incidence as each week goes by.

* * *

[DEP. PP. 17-24]

Q What pre-natal care advice do you generally give your patients?

A Well, we advise them as to diet, we prescribe pre-natal vitamins as supplements to their diets. We usually give them supplements in terms of iron. We advise them to keep up with their ordinary activities and ordinary sexual relations. Those are the majority.

Q Does this advice change in any respect as the pregnancy develops?

A Only in relationship to sexual relations, which are then stopped approximately six weeks prior to their expected date of delivery.

Q Have you ever noticed or observed any emotional behavior changes in pregnant women toward the latter stages of pregnancy?

A No really emotional changes in them. The serious

psychiatric problems related to pregnancy generally occur at one end or the other; that is, the woman who does not want the pregnancy, and when it is recognized may be decompensate at that point; or what is called post partum psychosis. That is a psychotic reaction that will occur in certain women after they have delivered. That is the ascribed syndrome.

Q Do women have a tendency to become anxious towards the latter months of pregnancy?

A Well, anxious is a general term. I think the major thing that we see is that they get very bored with the process and are very anxious to have it over with. They look forward to delivery. But as far as anxiousness related to agitation or something on that order, I wouldn't say so.

Q Is it your testimony that they are or may be pre-occupied with the pregnancy in the latter stages in relationship to anxiety?

A I wouldn't say so, no. I have not known, I can't think of any patients who have not been able to continue under any ordinary function this way. They generally feel, towards the end of the pregnancy, that nine months is a long time and they would like to go ahead and get it over with.

Q Generally how do you schedule your appointments with your patients?

A The average patient who is normal will be seen monthly throughout most of her pregnancy.

Q Generally once a month?

A Once a month. And then in the 8th month of pregnancy we see her every two weeks, and then for the last month of pregnancy we see her once a week.

Q Would it be safe to assume then if your patient was a working patient that she might have to lose an additional

day's time because of frequency of visits that you would expect?

A That depends on where she works, of course, and what her hours are. If she had to leave work to come for office visits—

Q I am only asking if it is possible.

A Yes, sir, I can see where it would be possible. I could see where they could work it out.

Q Is pregnancy a sickness or an injury?

A No.

Q Could you give a medical definition of what pregnancy is in physical relationship?

A It is a normal biological function. It should not really be regarded as an illness anymore than menstrual periods should be regarded as an illness or any bodily function should be considered as an illness. An illness is when bodily function is deranged, there is malfunction of symptoms and pregnancy is, of course, a normal biologic phenomena.

Q Is it possible that you would ever recommend to a patient that she should not drive an automobile?

A Related to her pregnancy per se?

Q Yes.

A About the only time I can think of in recommending that a patient not drive in pregnancy is if they are on medication that would interfere with their reflexes or ability to handle a car.

Q Sometimes they do take such medications?

A In early pregnancy they do. This would be particularly the anti-nausea pills.

Q Is it safe for a pregnant teacher in the latter stages

of her pregnancy to operate a motor vehicle for long distances?

A Yes, she can.

Q Without any harmful effects to herself?

A We are talking about someone not having an accident, just driving an automobile, then that should be of no particular hazard to her. Talking about automobile accident, that is another story.

Q Do you recommend that your patients avoid stairs or stay away from stairs?

A I don't advise them to avoid stairs, no, in pregnancy.

Q Is there any condition under which you would advise a teacher not to avoid stairs?

A You mean to avoid stairs?

Q Climb stairs.

A Let me think. No. I can't think of any times that I have recommended that.

Q Is there any situation in which you would recommend to a pregnant woman or patient that she not stand for long periods of time on her feet?

A Yes. If a patient has thrombophlebitis or clotting in their veins, then, whether she is pregnant or not, we advise that they don't either sit or stand still for long periods of time. And this is, as I say, true of non-pregnant as well as pregnant patients because they can, during that period of stasis, develop clots in their legs.

Q Do all of your patients have the same coordination?

A Coordination? We don't test for coordination, but I would assume that they have a range of coordination, but we don't test for coordination.

Q Is it possible then that some of your patients have better coordination than other patients?

A I would think they would have the same range of coordination as any other group of people. I can't answer that specifically because we don't test for it. But by coordination I assume you mean equilibrium?

Q And dexterity.

A And dexterity. I can't say that our patients are really different from any other group of people non-selected in any way that I know of.

Q It is quite possible, though, you could have some who are rather adept to good coordination and some who are not so adept to good coordination, is that possible?

A It's possible.

Q Would you ever recommend to any of your patients that they stay clear, as much as possible, from any emergency situations?

A Maybe, if you could tell me what you mean by emergency situations; I think that covers so much.

Q Well, let's say that the pregnant teacher, not teacher, patient has a child who becomes injured out on the lawn someplace seriously; would this be a bad situation for the pregnant patient?

A You are talking about her emotional reaction to this, I gather?

Q Emotional and physical.

A About the only time that the pregnant woman may in an emergency, if you want to use a very general term situation, may affect her is if her own status is endangered. This has more of an effect upon a pregnant woman than say witnessing something that is an emergency situation. If her

own well-being is in jeopardy, this is more from an organic disease than just an emotional impact, although some people feel that an emotional threat to an individual can affect the pregnancy. This is in that area that is very hard to get concrete information on. But those cases, let's say, of women who are felt to have lost a pregnancy, aborted, or gone into premature labor in a crisis, it has been their own situation that has been threatened rather than someone else, helping somebody else.

Q Would the pregnant woman's responses to an emergency situation be better or worse by reason of the pregnant condition?

A I know of no information related to that. I can't really say.

Q Can a woman not pregnant run as fast as when she might be pregnant in her 9th month?

A We have never taken them out on a track, but I would suspect an unpregnant woman would outrun a pregnant woman, depending on the stage of pregnancy, of course. I would think that her physical ability to run distances or rapidly would be impaired by her pregnancy.

Q In other words, this would greatly diminish her ability to perform.

A As far as speed running is concerned, or distance, probably would impair that.

* * *

Q Assuming that your son was being taught by a teacher and she was still teaching at the beginning of her 9th month of pregnancy and a fire occurred at the school, do you think the teacher who has the responsibility of getting the children out of that burning school could act as well in a pregnant condition as in a non-pregnant condition?

A If she had to physically climb out windows or had to carry students or something like that, or carry equipment, she might have more difficulty getting around.

* * *

[DEP. PP. 27-29]

Q When a woman comes into your office who is pregnant and asks for treatment during her pregnancy, the doctor will do a complete medical history?

A Yes.

Q And in this medical history you will find out her occupation, is that true?

A Yes.

Q Based on this information, plus I assume a complete physical is done on the woman, based on this information do you feel that the doctor is qualified to judge whether she should continue working at her present occupation?

A Yes. I would include in that the laboratory studies that are done on her early pregnancy as well.

Q Furthermore, is a woman instructed to inform her doctor if any changes happen to her that might affect the pregnancy?

A Yes.

Q Suppose a woman calls a doctor and tells him that something has happened. What steps does the doctor take then?

A Well, of course it would obviously depend upon what she reports on the telephone. Now, if she is talking about symptoms that she is experiencing that the doctor recognizes as normal changes in pregnancy, then he would reassure her as to the fact that this is normal and further instruct her as to what to expect in the future from that.

If it sounds like she has developed some sort of disease stage, that something is not normal, that is not physiologic, then he would arrange to see the patient for an examination.

Q Doctor, would the fact that emergency situations are apt to occur in any occupation be justification for not permitting a woman to work in an occupation such as a teacher?

A Well, again I would say this would depend upon what the occupation would be. If the situation in pregnancy where a person had to, you know, absolutely get through a certain space in a period of time, talking about a situation where mechanically the enlarging abdomen would not make it possible for this person to actually do this and that it would obstruct her ability to get out of a space or something like this, I would think that would be a real hazard.

Q Have you ever come in contact with any such cases where this has occurred during your practice as an obstetrician and gynecologist?

A No, I really haven't.

* * *

**DISCOVERY DEPOSITIONS OF C. DOUGLAS SPENCER,
ET AL.**

C. DOUGLAS SPENCER,

[DEP. PP. 3-7]

called on behalf of the plaintiff, first being duly sworn,
deposes and states as follows:

DIRECT EXAMINATION

By MR. MANN:

Q Mr. Spencer, please state your address.

A 4126 Beulah Road.

Q Are you a member of the Chesterfield School Board?

A That's right.

Q How long have you been a member?

A About fourteen years.

Q What is your educational background?

A The 9th grade in High School, formal education.

Q What do you do for a living?

A Printing business.

Q How long have you done this?

A 34 years.

Q Mr. Spencer, do you have any other qualifications to be on the School Board?

A What qualifications are you supposed to have?

Q I am asking you. Are you familiar with the case of Mrs. Susan Cohen?

A Fairly.

Q Do you remember when she appeared before the School Board?

A Yes, sir.

Q What was the action the School Board took on her case?

A They denied her.

Q What knowledge or information did you rely on to deny her an extension?

A The information that she gave and the recommendation of the Superintendent and we also have a policy mainly that we try to follow from year to year.

Q Did you rely on any medical knowledge or medical information?

A We had some medical information from her doctor, a letter that said she could work.

Q Could continue working?

A Uh huh.

Q Did you rely on any surveys concerning teachers in the system?

A They have surveys and we rely on the superintendent to give us that information when we set the policy at four months. They told us surveys indicated they had more absences from that date on so that is one reason the policy was set for four months.

Q Why did you pick four months?

A Well, we do not pick it. The teachers and the Superintendent and the policy committee picked it. The School Board does not pick this. That is done by the teachers on a yearly basis. If it is any changes to be made in the policy teachers and a committee get together and come to the Board with these changes in the policy, that they recommend. We do not improve them to disapprove them.

Q You approved the four months period?

A Yes, sir.

Q What were the reasons for approving it?

A The recommendation of the Superintendent and the committee.

Q Did you or any other member of the Board have any independent knowledge outside the recommendations of the Superintendent on which you relied on when you formulated the four months policy?

A Any outside?

Q Outside knowledge.

A We paid a fellow, a Mr. Hislip to make a survey. He earned his graduate degree from the University of Virginia, writing up a policy manual for us which took approximately a year, nine months to a year. He gathered information from the whole eastern coast and mid-west. I don't know how far he went to get his information to write up the policy manual. That is not just a local policy manual. It is from what the other systems do in other areas. We took the best of all of it.

Q Mr. Spencer, are you married?

A Yes, sir.

Q How many children do you have?

A One.

Q How old is he?

A 27.

Q Does your wife work now or did she used to work?

A No, she did work at one time.

Q Did she work at the time when you had your son?

A No.

Q Mr. Spencer, suppose Chesterfield County had a policy that stated a teacher would have to leave teaching at a, five or six or seven-months, would you have any objection to that?

A Well, I don't think anything would be necessary--- I don't think it would be necessary for them to leave at five or six months. I think four months is reasonable.

Q How about a policy that left it up to the discretion of the principal and the teacher and to her doctor?

A I would not be in favor of that.

Q Why not?

App. 41

A Because I think it is the Superintendent's position to recommend to the Board these policies.

Q Then you consider the Superintendent more qualified than a doctor?

A No, but the doctor can only say one. We are dealing with group. We are not dealing with one person. We are dealing with groups.

Q But you are dealing with each teacher individually as she comes before the School Board?

A If she comes before the Board. We only had three this year.

* * *

[DEP. P. 9]

CLARENCE E. CURTIS, JR.,

called on behalf of the plaintiff, first being duly sworn, deposes and states as follows:

DIRECT EXAMINATION

BY MR. HIRSCHKOP:

Q Mr. Curtis, state your name, please.

A Clarence E. Curtis, Jr.

Q Your home address?

A 12624 Petersburg Street, Chester, Virginia.

Q Are you a member of the School Board?

A Yes, I am.

Q How long have you been on the School Board?

A I was appointed to the Board in July, 1970.

* * *

[DEP. PP. 12-21]

Q So she can teach five months into the pregnancy.

Do you know what the rationale is for the time limit of five months?

A I do not quite understand your question.

Q Why five months as opposed to six months?

A I think this is our policy.

Q What is the basis of the policy aside from having the policy?

A It was recommended to us by our Superintendent of Schools.

Q Were you around when the policy was initiated?

A No, sir.

Q Do you know how it came to be?

A Not exactly, no, sir.

Q Do you know if it was witnesses or anything before the School Board?

A No, sir.

Q You assume it was recommended by the Superintendent of Schools?

A (Nodding head in affirmative).

Q Let's go back to the first question. Aside from the recommendation of the Superintendent or whoever made it, do you know of any reason why it would be five months as opposed to six months?

A I would not be familiar with that, no, sir.

Q If the superintendent then recommends six months, would that satisfy you?

A I think he would give thorough study to it and he would have just reasons if this is his recommendation.

Q Then if he came to you and said seven or eight

months, and again you have the assumption he gave it thorough study, would that satisfy you?

A I am not real sure.

Q Why not?

A I think they had a reason for not allowing any longer than four months.

Q I understand that. I don't mean to pick at you on this but in your mind I wonder if you know of any thing or can think of any reason because you are a voting member of the School Board, why you would object to a teacher teaching six months into the pregnancy aside from the policy?

A I think the condition of the individual would definitely have an effect on the school system.

Q How?

A I think the appearance for one thing.

Q Don't you think that high school children should see pregnant women?

A Definitely but I think it would affect the work she could do in the school system.

Q How would her work be affected?

A I think you would have to consider the state and welfare of the teacher to some extent.

Q Would she be more safe or less safe?

A I think she would be less safe.

Q Why?

A I think that is known. I am not a medical man either, so I don't know the real reason.

Q I would like to know if there is any rational basis. Is it just a feeling you have or a reaction, or do you have some basis for that feeling?

A I think, we are concerned with giving the children the best education we possibly know how. I do believe this condition would affect the educational program of our county.

Q I do not question your motives one bit. I am trying to determine how would it affect the educational program? You gave me a general statement.

A I think absenteeism increases in the last few months. This affects the educational program.

Q You say the last few months. You mean after the fifth month?

A Right.

Q What do you base that belief upon?

A From the recommendation that they set this policy by. I was not here at the time.

Q I want to know what you know. Do you know of any facts from which you could draw an inference?

A I am not that familiar with it.

Q So that you think that absenteeism would increase but you have no knowledge of any facts which would make you have a rational belief of that?

Aside from a belief that absenteeism would increase do you have any other reason why you would be opposed to a change of policy?

A No.

Q That is the only reason?

A I have stated earlier that I think it affects the educational standards of the school or program.

Q Is that because of potential absenteeism or something else?

A The absentecism has a lot to do with it.

Q Is there anything aside from the absentecism that would cause you to feel you should not alter this policy for a woman should not teach until her eighth month?

A Other than that I said earlier.

* * *

Q Have you consulted any studies or statistics informing your opinion on this maternity provision?

A No, I have not.

Q Do you know of any statistics or surveys or studies?

A No, I do not.

* * *

Q I was asking before about the reasons you have for substantiating or believing in this policy. You gave me absentecism. In light of these past few years are there any other reason you can think of for supporting such a policy?

A I have said it several times, but I think the welfare and the safety of the teacher should be considered along with the educational program of our county.

Q Do you think it is unsafe for a woman in her sixth or seventh month of pregnancy to be teaching?

A I do not think it is as safe as it should be.

Q What standard do you have? Again is that just a reaction?

A It is my personal feeling.

Q Based upon what knowledge or studies is that feeling.

A No study.

Q Just a feeling?

A Right, observation.

Q Aside from the safety of the teacher—Which observations?

A Concerning my own wife with the first pregnancy. The reason she stopped work.

Q The second pregnancy?

A The same thing, and the third one.

Q So you are basing part of your determination on this policy and the fact your wife was pregnant?

A (Nodding head in affirmative).

Q Did you wife cease to do her functions at home in the fourth month, cease to clean the house or cook?

A No.

Q I would rather not get into your personal life. I don't think it is necessary.

In regard to Mrs. Cohen, was it ever brought to your attention her doctor recommended there was no reason she should stop work?

A No.

Q Would something like that affect your judgment?

A I don't think so.

Q Assume that medical evidence determined there was no reason that a woman in her sixth, seventh or eighth month could not teach the same as in her second, third and fourth month. Would that affect your judgment?

A That I am not familiar with.

Q I am asking you to make an assumption. You have made an assumption to the contrary. Let us assume your assumption proves wrong. Let us say abundant medical evidence showed to you that a woman could teach just as well, just as safely, just as dependably in her sixth, seventh, and eighth month as the prior months? Would that change your opinion as to the propriety of this regulation?

A Again, perhaps the entire Board would consider the policy.

Q I am asking how you would feel, not the Board.

A I could not answer that right now.

Q Were you familiar with any recommendations by Mrs. Cohen's principal in this matter?

A Yes.

Q You mean of the fact he recommended she be allowed to remain until the end of the semester?

A This letter came before the Board on the same date her letter came, I believe.

Q In voting on the superintendent's recommendation, were you principally relying upon his recommendation?

A The Superintendent?

Q Yes.

A Yes, sir.

Q That is really what happens in Board affairs of this nature?

A I relied upon his recommendation.

* * *

JOHN W. RUSSELL,

called on behalf of the plaintiff, first being duly sworn, deposes and states as follows:

DIRECT EXAMINATION

By MR. HIRSCHKOP:

Q State your name and home address.

A John W. Russell, Midlothian, Virginia.

Q Where is your office located?

A Travelers Building, Richmond, Virginia.

Q Are you an attorney?

A That is right.

Q You are on the School Board here?

A That is right.

Q How long have you been on the School Board?

A Since 1959.

* * *

[DEP. PP. 25-48]

Q Do you know what the rationale is for having leave after five months of pregnancy?

A The rationale regardless of the month has to do with the number of days she is apt to be absent. It has to do with the possibility of an accident taking place in school.

Q What kind of an accident?

A Well, you have in your schools any number of people, and it is not as simple as it used to be. You have great numbers of pupils in school, pushing. It is taking place now. It does present a problem.

Q Is it your testimony there is more pushing in the Chesterfield Schools now than ten years ago?

A Certainly.

Q Why is there more pushing?

A You would have to go into something beyond me. I have my own opinion. I could spend the rest of the day discussing that type of thing. Is it a change in people and the times, et cetera, basically this is what it is.

Q Do you think it has anything to do with integration?

A No more than anything else.

Q Is it your opinion that that is because students are pushing each other more—

A Right.

Q That a teacher would be more apt to have an accident when pregnant?

A I would say very definitely. She is more or less off her equilibrium and her ability to stand and control herself then than when she is in a more normal or nonpregnant position?

Q If a number of reputable doctors would disagree in that opinion would that affect your judgment at all?

A Not with respect to the pushing, et cetera. I don't think a doctor would do that.

Q How about with respect to a woman's equilibrium?

A I don't believe he would do it.

Q This just seems to be fairly much of a medical judgment?

A Not on the pushing. I go into schools and visit schools right often. I am familiar. I have been pushed myself. I am familiar with this.

Q When was the last time a student pushed you?

A I would say probably two weeks ago when I was visiting a school. It is not an intentional thing. It is accidental. Students go to classes and you have great numbers. They do not intend it and do not mean it normally. Sometimes they do perhaps.

Q I want to understand this. One of the reasons you have for substantiating this policy is—

A This was not the basic reason. You asked me—

Q I want to know all your answers.

A My basis reason is the question of the fact a teacher after she does become pregnant, the chances the days she

misses from school as time goes on will become greater, the closer she gets into pregnancy.

Q What do you based that judgment on?

A On our own experience.

Q Whose own experience?

A My own experience of course as a parent also. I have had my own children. In addition to that I base it on consulting with other people who likewise have been pregnant. I talked with my wife.

Q How many months did your wife teach after she became pregnant?

A My wife is not a teacher.

Q How many months did she work?

A Not other than in the sense she is a housewife.

Q How do you know she would have—

A I know what time she was required to go to bed and stay in bed, and also she was in the hospital several times. This does happen.

Q Are you familiar with the fact a woman is much more apt to miss time in the first three months?

A I am familiar with that. It is not necessarily true. We discovered in the beginning we might have a rule that no one in that condition—I can't say. I don't know.

Q You can't say? You don't know? You do concede from your experience the first three months are more difficult than the latter six months?

A I did not say that.

Q And compare the first three months to the last six months of pregnancy.

A This I cannot say. It may well be.

Q You are drawing on your own experience from all these pregnant people that you talked to? Didn't they tell you about that?

A I am sure they talked about it. We never discussed which was more than the other.

Q What pregnant teachers have you talked to about their ability to teach in the last four months of the pregnancy?

A You mean recently?

Q Yes.

A I have not talked to anyone. This is the first problem we have had.

The first one we ever had to come before us.

Q Do you know of any studies to substantiate your conclusion a woman would be inclined to miss more time in the last four months?

A Only with respect to our studies we made.

Q Mr. Hislip's?

A No, I said also I have our discussions with teachers every so often with respect to this.

Q No formal surveys?

A No, no indeed.

Q Have you ever thought it would be a good idea to have a study made to see if there is any relevant basis for this policy?

A Should we? It is a possibility, yes.

Q Until now you have not bothered, have you?

A The question has not arisen. We do not usually until the question arises.

Q With regard to other reasons, aside from the propensity to miss time, you stated a teacher would not be safe.

A I said it is more apt to be danger during that period of time.

Q Aside from your own experiences, do you have any factual basis for that belief?

A If you mean studies, the answer is no.

Q Has any doctor ever told you that?

A What?

Q Well, that a woman would be less safe, not as much safety if a woman taught after the fifth month?

A Not directly. In a general discussion. I have never taken it up with a survey. In general discussion I am sure it has happened many times.

Q Aside from the students pushing each other in the hallway what else would tend to make it unsafe after the fifth month?

A Beyond that point you would have to ask the doctor. I cannot answer that.

Q I want to know what you believ .

A I cannot answer.

Q The only thing you would have then which makes it objectionable would be the pushing?

A Of my knowledge, that is correct.

Q Are there any other reasons you know of or believe to substantiate this policy other than the two you have given?

A As far as I know there are none.

* * *

C. C. WELLS,

called on behalf of the plaintiff, first being duly sworn, deposes and states as follows:

DIRECT EXAMINATION

By Mr. HIRSCHKOP:

Q Mr. Wells, what is your address?

A Matoaca, Virginia.

Q How old are you, Mr. Wells?

A Subtract 1892.

Q Would 79 be a reasonable figure?

A I was born in 1892. I am 78.

Q Mr. Wells, how long have you lived in Chesterfield County?

A My entire life.

Q How long have you been on the School Board?

A I say approximately 18 years.

* * *

A No, no special training.

Q Mr. Wells, do you know anything about the maternity policy of the School Board for pregnant teachers?

A Yes, we do not have a set standard. It is usually through the recommendations of the Superintendent.

Q Mr. Wells, you must know about everybody in this county by now.

A I know lots of people.

Q Do you know any reason why a pregnant woman should not be allowed to teach?

A Well, I don't know any reason why they should not be allowed to teach up to a certain standard.

Q A certain time?

A A certain time, yes.

Q What time is that?

A I would say when they became very conspicuous, and

they could not give more time to teaching. They had to give it to the maternity cause.

Q What do you mean by conspicuous, when the belly starts to show?

A Yes, because some of the kids say, my teacher swallowed a water melon, things like that. That is not good for the school system.

Q Don't you think high school students should know about those kinds of things?

A Yes, I think high school students should know.

Q What reason would you have for such a policy in high school teaching?

A Well, the policy in the high school, we do not have any policy other than when we think the teacher cannot give full time to her classroom work because if it is a maternity case she has to give more time to her health and her environment.

Q Don't you know, Mr. Wells, lots of women work in other jobs through the seventh and eighth month of pregnancy?

A Yes, I think so.

Q They work okay, don't they?

A So far as I know.

Q Why could not a teacher do that?

A Well, I really don't know. I can't answer that question because I don't know how the teacher is affected in her health. I don't know whether she has got to give more time to her maternity reasons and to her home and environment, medical care, things like that.

Q In supporting this policy you really just took the recommendation of the Superintendent, ain't that right?

A We have not had very many cases to come before the Board.

Q Yet you have a set policy written down?

A That is usually worked through the Superintendent, and his recommendation comes to the Board.

Q But the reason which support the policy as far as you know, you just rely on the Superintendent's recommendation?

A That is right. As far as I am concerned the teacher can teach on until she enters the hospital.

Q If the Superintendent recommended that that would be okay with you?

A That is right. After all the Superintendent runs the schools.

* * *

G. L. CRUMP,

called on behalf of the plaintiff, first being duly sworn, deposes and states as follows:

DIRECT EXAMINATION

By MR. MANN:

Q Mr. Crump, please state your address.

A Mosely, Virginia.

Q Are you a member of the School Board?

A Yes, I am.

Q The Chairman?

A Yes.

Q How long have you been on the School Board?

A I think I went on there in 1951.

* * *

Q Were you a member of the Board when the policy was first promulgated?

A Yes.

Q What was the rational in adopting this policy?

A Well, the policy was adopted on the recommendation of the consultant we had, that had worked with teachers and staff and the School Board.

Q Was any medical testimony presented to the School Board when this policy was adopted?

A Not to the School Board, not to my knowledge.

Q You adopted it on the recommendation of Mr. Hislip.

A He worked with us, yes, sir, as a consultant.

Q Do you feel this policy is a reasonable one?

A I do, yes.

Q What is your reason?

A Well, we have to take into consideration first the child and then the teacher. We feel that for the benefit of the child this is a good time to stop. We feel also for the benefit of the teacher since at four months, it is necessary for her to climb stairs, it would be necessary for her to be in halls at rush time with school children, this type of things. We feel for the safety of the teacher this would be a good time.

Q What do you mean by for the benefit of the child?

A Well, basically we feel that in the school set up that pregnancy presents some uncomfortable position for the teacher and I think because of that could overflow to the student.

Q What do you mean by an uncomfortable position?

A Because of the size and the growth in the stomach of the child.

Q On what did you base this opinion?

A Just a personal opinion.

Q Have you ever consulted any doctors on this?

A No.

* * *

[DEP. PP. 40-41]

Q Suppose the School Board enacted a policy whereby a teacher was allowed to teach through her seventh month, would you consider this reasonable?

A I don't think I would agree with it.

Q How about three months?

A Well, I think we have arrived at what we feel is a very justifiable policy. I don't think I would change it.

Q What do you mean by a justifiable policy?

A As far as the dates are concerned?

Q Why not four months?

A Four months is what we have.

Q Why not six months then?

A I am a parent. I am somewhat familiar with this. I have two children. I think from what my wife went through I would say four months is a good time.

Q Did your wife work before?

A No, she did not.

Q She was just a housewife?

A That is right.

* * *

[DEP. P. 47]

ROBERT F. KELLY,

called on behalf of the plaintiff, first being duly sworn, deposes and states as follows:

* * *

[DEP. PP. 49-50]

Q Have you ever dealt with such a policy before, maternity leave policy?

A I have not.

Q Have you ever had reason to explore as an administrator whether such a policy was rational or what perimeters there should be in the policy?

A I have not.

Q Did you have any empirical data when you took over to substantiate four months before pregnancy was a proper time for a woman to leave employment?

A I did not.

Q Referring to the time that Mrs. Susan Cohen left the school, at that time had you gotten any empirical data?

A Empirical, no. We had some general surveys that were not done for Mrs. Cohen; for general information as to the number of months at which we felt the teachers had an inordinate days absent.

* * *

[DEP. P. 53]

Q Did you recall on November 11 you recommended a Mrs. Barbara Westerhouse and Sherry Bowman not be extended?

A That is correct.

Q What were the reasons for not extending them?

A We had teachers who could replace them immediately.

Q With regard to the policy itself other than replacement question do you see any other reason why you would extend this policy?

A Say that again, please.

Q Do you know of any circumstance other than replacement question involved when you would otherwise make an exception to the policy?

A Upon a very strong recommendation of the principal.

* * *

[DEP. P. 57]

Q Do you know if the number of days out in the first five months would tend to be much higher than the number of days out in the later four months?

A No, I do not have any information to say that.

Q Are you married?

A I am.

Q A father?

A No.

Q You do not know about pregnancy on a person on first-hand basis, do you?

A No.

Q You don't know much about the woman's physiological condition at any given month during her pregnancy?

A No.

Q You have no medical knowledge of this?

A I do not.

Q You have had no doctors give you any medical information?

A I do not.

* * *

[DEP. PP. 60-66]

Q Would four months be better than five months?

A I don't have an answer for that.

Q Would six months be better than four?

A I don't know.

Q Would seven months be better than four?

A I still don't know.

Q Eight months better than four?

A I still don't know.

Q How about two months?

A I still don't know.

Q You have no idea which month is best, do you?

A I do not.

Q How did you go about recommending a teacher should leave? Based on the existence of the policy?

A The School Board policy.

Q What is the rationale of this policy?

A The rationale is that at a certain point in a term of pregnancy a women becomes physically dependent upon services of a doctor, becomes physically open to harm by students in pushing.

Q Is there any other rationale? Are they the only two?

A All I can think of.

Q If a man had a sprained ankle, would you put him on some kind of leave?

A We do.

Q For a sprained ankle?

A Not leave, but if he wants to stay out he is given sick leave.

Q If he wants that. You force him to stay out?

A No, we do not force him.

Q Let's be plain about this. If a man came with his ankle in a cast you would let him teach Biology?

A That is correct.

App. 61

Q He would be subject to pushing? He would be less stable than a pregnant woman, perhaps, wouldn't he?

A I don't know if I can answer that question.

Q All right. Have you ever heard of morning sickness?

A I have.

Q You understand it is something referring to pregnancy during the early months?

A I do.

Q Would a woman be more stable or less stable in terms of her balance during morning sickness periods?

A Not being a medical doctor I don't think I can answer.

Q How does pushing affect a pregnant woman?

A I think just the extension of the stomach due to pregnancy and the possibility of hurting the child and the mother and the intended mother.

Q Which child? The one inside or the one outside?

A The one inside.

Q How is it going to get hurt?

A I think it could be physical damage to the child.

Q If a doctor said that is really not the case, and it is really no danger to the child, would that affect your judgment?

A If a doctor said so?

Q Yes.

A I might ask for other doctors to give me competent answers.

Q Don't you trust any given doctor?

A I think they are opinions just as they are with many subjects.

Q About certain educators, about certain male chauvinistic viewpoints of pregnancy?

A Possibly.

Q Would you characterize it as a male chauvinistic viewpoint of pregnancy?

A' I would not.

Q Do you hold any prejudice towards women?

A I do not.

Q Do you think women should have equal employment opportunities?

A I do. They are granted that in Chesterfield.

Q What are the sick leave policies with regard to various ailments of men?

A They are granted one day per month sick leave, ten months per year.

Q What about mandatory leave?

They must leave with certain illnesses?

A I believe. I don't believe we have any at this point.

Q You don't? How about ~~post~~operative care? Do you make a teacher take a certain amount of leave after an operation?

A Depending upon the doctor, to give us an indication when the person should return to work.

Q Isn't it a fact when a teacher has an operation he comes to work and you accept the fact he says he can work? You don't make them bring a doctor's excuse, do you?

A I don't think there is a regulation that I would suspect the principals probably would ask.

Q Let us talk without your knowledge. Have you ever made a teacher bring in a medical excuse to allow him back in the school, a male teacher?

A I have not.

Q Would you ever do that as a professional?

A Yes, I would.

Q Under what circumstances?

A Under the circumstances of a person who was committed to a—

Q Mental institution?

A Yes.

Q And had a communicable disease?

A Yes, sir.

Q How about a broken leg? Where a man had an operation?

A No, I do not.

Q Gallstones removed?

A I do not believe we probably would do that.

Q How about if a woman had a D. and C? Do you know what that is?

A I do not.

Q How about if a woman's tubes were tied? Do you know what that is?

A I do?

Q Would you make her bring in a medical certificate to come back or would you accept her judgment that the doctor said she is well enough to teach?

A I would accept her judgment.

Q Why won't you accept the similar type judgment in pregnancy situations?

A I personally think the similarities are not the same.

Q Do you have any medical knowledge of the similarities?

A I do not.

Q Let's go back to the pushing. In all the time you have been in the schools, how many babies have been lost in school after a woman got pushed in the stomach?

A I know of no cases.

Q Have you ever heard of any cases?

A Not personally at this point. I cannot say that I have.

Q What makes you think it is dangerous for a pregnant woman because of pushing?

A I have no medical knowledge of it.

Q Is all this pushing taking place in the hall or in the classroom?

A I think at any given place, both.

Q How many have you seen pushed in the stomach in the classroom, pregnant or not pregnant?

A If not pregnant, she does not stick out as much as a pregnant woman. I have not seen any.

Q How many inches does a pregnant woman stick out?

A Beyond her normal waist line.

Q That is reasonable. Aside from sticking out where is her sticking out getting her pushed? In the hallway?

A I am saying for the protection of the mother I feel that the possibility that the pregnant woman could be pushed, forcing her against the wall, forcing her against another student, and for that reason I think possibly she could be hurt and the child could be hurt.

* * *

[DEP. P. 69]

Q You have no idea what the absentees were for, do you?

A No, except they were not in school.

* * *

[DEP. PP. 72-74]

Q I want to wrap this up. I have asked what the main reasons were. You said two. One was the dependency of the woman in performing her functions, right, and the question of absenteeism?

A Yes.

Q And two was the safety of the woman.

A That is right.

Q These are the reasons you have for the policy?

A That is right. Well, let me clarify that. They are my interpretations of the policy. The policy was written before I arrived.

* * *

Q You have no data upon which to reasonably conclude the sixth, seventh or eighth month would be high absentee months, do you?

A No, I do not.

* * *

**SUPPLEMENTAL DESIGNATION OF JOINT APPENDIX
EXCERPT OF REPORTER'S TRANSCRIPT
PROCEEDINGS**

[TR. P. 10]

SUSAN COHEN

was called as a witness in her own behalf and, having been first duly sworn, was examined and testified on her oath as follows:

DIRECT EXAMINATION

BY MR. MANN:

Q Please state your name and address?

A Susan Cohen, 5103 Downy Lane, Richmond.

Q Mrs. Cohen, what was your former occupation?

A School teacher.

Q What school?

A Midlothian.

* * *

[TR. P. 17]

Q Mrs. Cohen, have you experienced any real problems, health problems, during your pregnancy?

A No. None.

Q Please tell the Court what has been your normal routine from the periods since you have left teaching until now?

A Shopping, entertaining, doing a lot of house work, running around with friends.

Q Would you say that this routine has been more fatiguing than your former routine as a school teacher?

A Well, I am doing more physical labor and house work now that I am home all the time, probably than when I was teaching and in school.

* * *

[TR. PP. 27-38]

Q Have you experienced any swelling as a result of the pregnancy during this term?

A Perhaps a slight swelling in my fingers.

Q Anywhere else?

A Not that I can think of.

Q Other than that?

I was thinking specifically of feet or ankles.

A Well, I have been running around the same way I have always run around. I am generally active and I have been able to maintain that activity.

Q Are you maybe getting a little tired sleeping on your back or side?

A No.

Q By reason of pregnancy do you sleep on your belly?

A I sleep half on my belly and half on my side, but I am just as comfortable as I have always been and I sleep the whole night.

Q Have you experienced any backaches of any sort?

A Any real backaches, no.

Q No backaches at all?

A No.

Q Mrs. Cohen, do you think you could run as fast today as you could five months ago?

A Well, I was never particularly good in athletics so I don't know if I could run as quickly today as I could then. Probably not. But I definitely can get around and can move as quickly now, almost as quickly now as I could before.

Q Now, you don't think you could run as fast?

A Well, I never could run quickly.

MR. MASON: That is all. Thank you.

THE COURT: Any redirect?

MR. MANN: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. MANN:

Q Mrs. Cohen, were these sick days you took during the latter part of this year, were they due to illnesses or due to your pregnancy?

A They had nothing to do—totally unrelated to my pregnancy.

Q And Mrs. Cohen, did these sick days exceed the number of days allotted to you under the school board policy?

A No, they did not.

* * *

DR. DAVID C. FORREST

was called as a witness by and on behalf of the plaintiff and, after having been first duly sworn, was examined and testified on his oath as follows:

* * *

Q Dr. Forrest, please state your name and address?

A I am Dr. David C. Forrest. I live at 3908 Exeter Road, Richmond, Virginia, and practice medicine at 4908 Monument Avenue.

Q What is your profession?

A I am an M.D. specializing in obstetrics and gynecology.

THE COURT: Dr. Forrest is qualified as an expert in the field, gentlemen.

MR. MASON: We are willing to acknowledge that.

THE COURT: He is qualified. He has qualified here before and I know from personal experience of one instance that he was the best in the world.

BY MR. MANN:

Q Dr. Forrest, have you ever examined Mrs. Cohen?

A Yes, I have.

Q When did you first see her?

A I think it was in and around the latter part of September. I think the 26th of September, 1970.

Q What physical findings did you make at this time?

A She was found to be early pregnant with the last menstrual period dating from, I think, July 21. She was given an expected date of confinement of April 26, of this year.

Q Dr. Forrest, has there been anything whatsoever to indicate that Mrs. Cohen has not been undergoing anything other than a normal pregnancy?

A No, I think the pregnancy has been essentially uneventful.

Q How often did you see Mrs. Cohen during her pregnancy?

A Either me or my associate, Dr. Knight, saw Mrs. Cohen at regular intervals of a month apart until she reached the seventh month and since the seventh month she has been seen at about every two weeks, until the last month, in which case she is being followed at weekly intervals.

Q And on these subsequent visits did you repeat the physical examination?

A Yes, they have been repeated.

Q Dr. Forrest, what are the different types of symptoms that are associated with pregnancy?

A Well—

Q Do you understand my question?

A Are you asking the initial subjective symptoms of pregnancy?

Q Yes.

A Easy fatigability, occasional morning nausea, breast changes, occasionally they complain of some frequency and urgency of urination.

Q At what stage of a woman's pregnancy do these problems occur?

A Generally, they occur in the first ten to twelve weeks and subside after the first trimester.

* * *

Q Are there any medical or physical changes certain to occur during the last four months of an average pregnancy that might render all or substantially all pregnant women incapable of working in an occupation such as a teacher?

A That is a very broad question. I feel that each pregnancy and each individual, and that includes succeeding pregnancies, have to be treated and managed in accordance with the progress that the pregnancy is making and the progress the pregnancy is making and any concomitant complications that may develop.

Q I see.

Would you consider the job of a teacher teaching high school children a particularly strenuous occupation requiring special treatment?

A No.

Q What would such a strenuous occupation be?

A I think if a girl worked as a riveter or in some hazardous occupation where she was required to do heavy lifting she would be subject to sudden jolts or was placed in a position where she might be in mechanical operations, that this, I would consider as hazardous. And I doubt that the word hazardous is correct. I think it would probably cause her some jeopardy.

Q Dr. Dunn, when a woman—I will get this right in a minute.

Dr. Forrest, when a woman comes to your office to be treated for her pregnancy, that is not the word, but what do you suggest that she do?

A Well, at the time of the initial visit we try to impress

upon her the fact that this is a physiological state and that we hope to care for her in a manner that will bring her to term and delivery in a normal, healthy state and so that she has a normal, healthy baby.

We try to impress upon her certain restrictions. They are minor. They are asked to watch their diet, not to gain too much weight, generally not over ten to fifteen pounds over the normal weight. If a girl is heavy sometimes we encourage them not to gain any weight. She is told to discontinue douches. She is told to watch highly spiced and highly seasoned foods since they do increase the symptoms of heartburn. She is asked to avoid all unusual medications, not to have any x-rays without prior permission. She is told not to take long trips beyond a hundred and twenty-five miles without permission.

Generally, the restrictions are minor. Nothing major.

Q Do you recommend that she continue her normal routine throughout the time of pregnancy?

A Yes. This includes athletics if she is participating in some minor athletics. We try to encourage them to continue their normal daily routine as much as possible.

Q Dr. Forrest, have you ever encountered a case where a female teacher who was pregnant was injured due to some pushing in school halls?

A I can't recall a case.

Q Would pushing present a real threat to a pregnant woman?

A No more than probably being pushed while she was shopping at Willow Lawn or someplace like that. I presume that the implication is, would she be able to handle herself as quickly as she would in a non-pregnant state and during pregnancy and I think that as the pregnancy progresses and

the uterus enlarges and the protuberance of the abdomen becomes more prominent, I think these girls tend to move slower. I think they have certain restrictions in their motion and except for—I don't think it has anything to do with their mental capacity, I think as far as going up and down stairs and riding in an elevator or something of that nature, she would be able to perform very well.

Q Do you feel that a woman would react in an emergency situation less quickly mentally than if she were pregnant than a woman who was not pregnant?

A I don't think so.

Q Dr. Forrest, would you consider that pregnancy is a special condition requiring some special treatment by employers or should the pregnancy be treated as any other condition that might affect the working capabilities of a woman?

MR. MASON: Your Honor, I object to that question because it goes to the heart of the issue that this Court must decide itself.

THE COURT: Well, I think you have to limit it, Mr. Mann, to what you are talking about. Are you talking about the physical welfare of the patient? That is what the doctor is qualified in.

Objection sustained in the form in which the question is asked.

BY MR. MANN:

Q I will try again.

From the standpoint of physical welfare of the patient, would you consider that pregnancy is a special condition requiring special treatment by employers?

THE COURT: Wouldn't it really go to the type of work?

THE WITNESS: Yes, I think that is an individual thing.

That is what I tried to point out, Judge Merhige, is that I think the particular individual and the particular pregnancy of an individual is an individual thing and has to be managed in an individual manner.

BY MR. MANN:

Q This would depend on the type of work she was doing?

A And the type of pregnancy she had.

THE COURT: It would also depend on the type of person, wouldn't it, the individual person?

THE WITNESS: That's right. The past physical history. A past obstetrical history, all of these things would have a bearing on any decision you would make.

I don't think you can give a carte blanche statement.

* * *

CROSS-EXAMINATION

BY MR. MASON:

Q Dr. Forrest, I believe I understand your testimony that you must decide each patient's case on its own merits, is that not correct?

A I think that is correct.

Q I mean you couldn't generalize or make a general statement as to a whole group of people, that is going to apply to each individual, could you, sir?

A That is correct.

* * *

[TR. PP. 40-51]

Q What, may I ask, are some of the common problems associated with pregnancy throughout the term?

A Specifically related to the pregnancy? The pregnant state or the person as an individual?

Q Well, I am talking about the illnesses that are associated directly with the pregnancy during term.

A Well, recognizing the fact that a woman who is pregnant is subject to all of the diseases of the girl who is not pregnant or the woman that is not pregnant, there are certain diseases that may be specifically related to the pregnant state. For example, toxemia of pregnancy which is a third trimester disease, a disease that occurs in the last three months of pregnancy, is an example. They may be a little bit more subject to urinary-tract infection, which is in question.

Q What about nausea, do they experience nausea?

A Yes, I think I mentioned this in my earlier testimony, that that might be an earlier symptom of pregnancy.

THE COURT: Is there a particular time in which one is more subject to be incapacitated during the term? I gather from what you said that was in the early stages rather than the middle.

THE WITNESS: Middle and last.

THE COURT: Can you say that generally?

THE WITNESS: Generally, that is true.

We occasionally see patients who experience, for example, nausea throughout their whole pregnancy, but this is an individual case.

THE COURT: Go ahead. I am sorry, Mr. Mason.

BY MR. MASON:

Q Have you ever had cases involving premature birth?

A Yes.

Q This is quite possible, is it not?

A Early miscarriage, premature birth, these are complications specifically to pregnancy.

Q Could that happen to Mrs. Cohen?

A It can happen to Mrs.—it could have happened to Mrs. Cohen. She is about at the delivery stage, so it couldn't happen at this date.

Q Well, I understand that.

What about discharging water or blood? Does this happen pregnant women?

A It can occur in pregnant women. It also occurs in non-pregnant women.

Q Could it occur in Mrs. Cohen?

A Yes, it could occur. I don't recall that it has occurred.

Q It could occur in any woman possibly, could it not?

A That is correct.

Q I believe we covered that question.

Now, you spoke on direct examination—you spoke about hazardous occupations. Do you recall that?

A Yes, sir.

Q Suppose you had a patient who was a teacher and taught physical education. Would your feelings or thoughts be the same from the standpoint of hazards to pregnant teachers?

A This question comes up from time to time, if I can relate it, to girls, for example, who ride horseback, professional horsemen, to girls who play golf, tennis, and generally we ask them not to push themselves to fatigue, not to over exert themselves, but allow them to continue as long as the pregnancy has not complications and they do very well.

Q Well, specifically about physical ed—

A I am sorry. I did not answer that. A girl who is in physical education, she could proceed, again, with the majority of things that she would carry out since this was her

own occupation, that she had done this previously and her body was trained to do it. I would again just warn her not to do this to fatigue or to maximum exertion and to consider that she was pregnant.

Q Do you think Mrs. Cohen could do push-ups with the same ease in a pregnant state as a non-pregnant state?

A If Mrs. Cohen were doing push-ups before she was pregnant up through a certain state, she could probably continue them.

Q What do you believe that stage might be?

A I have never thought about the question specifically. I would presume that somewhere in the neighborhood of the fifth or sixth month. This is about the time that the girls begin to sleep on their side or their back and stop sleeping on their abdomen; that she would probably desist at that point, primarily more from her own personal feeling that if she were to slip or drop, she would drop on her abdomen. Women have an innate capacity to protect themselves—

Q I understand.

A —when they are pregnant.

Q But do I understand from your testimony that this would be somewhere depending on the individual, between the fourth, fifth and sixth month?

A For push-ups?

THE COURT: That is the question.

THE WITNESS: Yes, sir. Again, it would be an individual thing.

BY MR. MASON:

Q It would be somewhere in that range, would it not?

A Yes.

Q You agree with that?

A This is a personal opinion.

Q I understand.

Does a pregnant teacher particularly in the latter stages undergo any mental changes at all?

A No. No different than the pregnant housewife or the pregnant clerk. No, she doesn't.

Q Is it safe to assume then a pregnant teacher in her eighth or ninth month does not become preoccupied with the child that she is carrying?

A I am sure that she is consciously aware of the physiological state and that with the increased fetal activity that occurs in the last two months of pregnancy if, for no other reason, just the movement of the fetus would make her conscious of it, but whether it causes her any mental changes, I don't think it does.

Q Do you think that she would be able to handle the day-to-day confrontations with the student in the classroom?

A I should think so, if she were trained specifically for this. I see no reason why she shouldn't continue to perform.

THE COURT: Until when? Let me get it straight.

THE WITNESS: I would say until she goes into labor. If I may, just compare. If the mother is being a housewife and taking care of children at home, I am sure that she is going to continue to be a housewife and take care of children until she goes into labor and she is trained as a housewife and a mother.

BY MR. MASON:

Q Does the latter of stages change or have any bearing on the temperments of the pregnant woman?

A Here again I feel this is an individual matter.

Q Is it possible that she could be more irritated easier?

A When you ask me this question I think in terms of comparing her with the woman who has nothing to do, beyond the essence of her being anxious or concerned, I don't think it would be any greater than the woman who was working and the one who is not working. I think all pregnant women, I say all pregnant women, that probably is incorrect, I think the majority of pregnant women have in the last couple of weeks, they are concerned about when they are going to deliver. They have got everything ready and they want to know are they prepared at home and so forth, but aside from that I don't think psychological changes that say, all right, it is the eighth month, you are now going to be upset, I can't answer that question.

Q Is it safe to assume then that you can't make this judgment except on a strict individual basis?

A I would agree, yes.

Q Dr. Forrest, are you aware that teachers in the public school system in the State of Virginia are charged with the responsibility of looking after the safety of children in emergency situations?

A Yes, I am.

Q Would you say that schools, like any other kind of building, are subject to fires?

A Yes.

Q Fires can occur in schools.

Would you consider a fire in a school in which a pregnant teacher was teaching hazardous to her?

A Here again, except for the physical enlargement of the abdomen and the fact she couldn't get through a little window that she may have been able to get through before she was that much pregnant, I can't see that she can't go down

the stairs or do what she has to do. Except for this protuberance which might be restricting to her from going through a smaller hole, I mean a small window or area than she would if she were not pregnant.

Q But she has thirty or thirty-five students she has to get out of the school building. Wouldn't that have some bearing?

THE COURT: I thought the rule was to walk and not run, Mr. Mason. Would she be capable of doing any more than a person of the same weight?

THE WITNESS: I don't think so, Judge.

Now, if it came to lifting someone that weighed two hundred pounds, I doubt that she would do this as well if she were not pregnant.

BY MR. MASON:

Q Knowing that teachers are charged with the responsibility of getting their students out of a burning school building, would you prefer to have your kindergarten child's safety looked after by a non-pregnant teacher as opposed to a pregnant teacher?

A I don't think I would consider that. It wouldn't make no difference to me.

THE COURT: Wouldn't make any difference.

THE WITNESS: Wouldn't make any difference.

BY MR. MASON:

Q Is the coordination of a pregnant person in the latter stages of their pregnancy diminished by reason of the pregnancy?

THE COURT: When you say latter stages, are you talking about four months and five months? Tell me what you mean, Mr. Mason, if you have something specific in mind.

You mean the last month or the last two weeks or the last three months or the latter stages under normal conditions are the last three months, if you divide it into thirds, what do you have in mind?

MR. MASON: Well, to emphasize the point, let's say nine months. In the ninth month of pregnancy is her coordination and agility and dexterity diminished in any way or any degree by reason of her pregnancy?

THE WITNESS: I don't think that there is any question that it is. I don't think, for example, that she has difficulty, for example, putting on her shoes or tying her shoes and maybe things like that. Again, purely a physical thing and in other girls, as I say, they have ridden horseback through the eighth month and again they get on a horse and they seem to find no difficulty, but I think they would just from the physical enlargement of the abdomen have some restrictions and that is the way I would like to leave it.

BY MR. MASON:

Q Oh, isn't it true here again you have a situation that you must decide each case on its own particular merits?

A Oh, I would answer that, yes.

Q Now, let me understand, let me see if I understand your testimony correctly in connection of scheduling of appointments. Did I understand you to say that for the first—for the first six months that you schedule your appointments once a month and through the seventh and eighth month, twice a month and through the ninth month, once each week, is that correct?

A Yes.

Q What are your office hours?

A From ten, generally from ten in the morning until I

finish in the evening, which can be as late as five thirty or six o'clock.

Q Generally isn't it true that your patients, if they are working mothers, have to miss some time from work in order to attend these appointments?

A Of course I don't involve myself too much with this, but the girls seem to get in when they are supposed to get in and the receptionist makes the appointments and they come at their convenience. How they make the arrangements I am not familiar with.

Q Well, if they are working and this is Monday through Friday, they are missing a day from work?

A We don't, for example, try to see anyone on a scheduled appointment after four in the afternoon and we have no Saturday hours, so these girls do come throughout the week.

Q And as a result if they are working, they must miss work to do it, is that correct?

A Depends on what hours they work.

Q Well, daytime hours, schooltime hours?

A I don't know what time they get out of school. I mean if they get out of school at one o'clock or two o'clock they would still make a three thirty or three forty-five appointment.

Q Yes, sir.

* * *

[TR. P. 57]

CATHERINE EAST

was called as a witness by and on behalf of the plaintiff and, having been first duly sworn, was examined and testified on her oath as follows:

DIRECT EXAMINATION

By MR. HIRSCHKOP:

Q Would you state your full name, please?

A Catherine East.

Q Your home address, please?

A 5312 North 32nd Street, Arlington, Virginia.

Q Mrs. East, where are you employed?

A Labor Department.

Q With the United States?

A United States.

Q And at the Labor Department what is your present duty?

A I am executive secretary of the Citizens Advisory Council On the Status of Women.

* * *

[TR. P. 64]

THE COURT: All right. She is qualified.

MR. RUDY: Well—

MR. MASON: May I get some clarification as to what?

THE COURT: Spell out exactly what field.

MR. HIRSCHKOP: Public personnel policies in the field of the status of women in the labor force, Your Honor.

* * *

[TR. PP. 66-79]

THE COURT: Well, she is qualified in relationship to the field of whom generally employs people and I qualify her as an expert and that is it.

MR. MASON: As pertains to public employment and private employment, except for teachers.

THE COURT: Women. No, I am not excluding teachers. You may take your exception.

MR. MASON: We would except to that, Your Honor.

THE COURT: Go ahead.

BY MR. HIRSCHKOP:

Q Now, Mrs. East, what is the purpose of the job related maternity benefit paper of the President's council?

A Well, we would hope to bring some uniformity into an area where there has been none. We found in looking into this that in some situations maternity has been considered as a "normal physiological process." And when it is so considered the effects of that have been to deprive women of certain rights we thought they should have had. In some of the cases it has been considered as a temporary disability, which has seemed to us it was, after studying it.

The council concluded that childbirth and applications of pregnancy are, for all job-related purposes, temporary disability and should be treated as such under any health insurance, temporary disability insurance, or sick leave plan of an employer, a union, or fraternal society. Any policies or practices of an employer, either written or unwritten, applied to instances of temporary disability other than pregnancy should be applied to include pregnancy or childbirth, including policies or practices relating to leave of absences, restoration of or recall to duty and seniority.

Q Did you draw a distinction between the pregnancy period and the period after child is born?

A Yes. We felt that one of the reasons that has been so much confusion in this area is that pregnancy and/or childbirth and child rearing have been confused. They are two separate functions. Only mothers, only women can bear children, but other people can rear them. And we felt that

many of the maternity leave policies, so called, and many of the requests for them were really related to child rearing rather than child bearing. So we tried to make a distinction. This paper relates only to child bearing and to the complications of pregnancy, our subject did.

Q With relation then to the findings of the President's advisory council, status of women, wasn't there official conclusion that women should not be, as a matter of course, terminated from employment or suspended from employment on a fact of pregnancy at some arbitrary date?

A Definitely. The council felt, just as the doctor testified, that it is a highly individual matter. That women are just as capable of deciding their own physical welfare, pregnant women, as any other group. Employers normally don't tell you how long you have to be off for a hernia or heart attack, so we decided there was no more reason to tell a pregnant woman how long she should be off. It was a medical question for her and the doctor.

Q This thing you have referred to, is this the official report of the President's committee?

A Yes, sir. We publicized this and sent it to the press and to federal agencies.

* * *

BY MR. HIRSCHKOP:

Q Now, I ask you to look at this document.

A Yes, sir.

Q Are you familiar with that document?

A Yes, sir, I am.

Q What is it?

A It is current estimates in the health interview survey by the Public Health Service, for 1968.

Q Right.

Did you consult this document in arriving at your conclusions on maternity benefits and things like that?

A Yes, sir, we did. The council is made up primarily of business women who are pretty hard-headed and they didn't want to make any unreasonable recommendations or any recommendations that were going to deprive women of opportunities for employment. So we were concerned with, you know, the costs of treating this as any other temporary disability. We knew the federal government did. We had that information and how much time used in the federal government as opposed to industry and so on and also consulted with others because that is a nationwide survey and we found that the—

Q Page seven?

A Page seven. That the days used, the disability, the time lost from work or not, that this is the days of restricted activity per year, on page seven. This would include everybody, people working and not working, but it does indicate that pregnancy is a rather minor part of the reasons why people have restricted activity. That is not really anything that is going to add greatly to the cost of health insurance programs or disability insurance programs or sick leave programs.

We found that per hundred women per year, forty-six days—there were forty-six days of restricted activity due to deliveries and disorders of pregnancy.

Now, when you look at the upper respiratory conditions for example, it is one hundred eighty-five days.

For injuries it is one hundred fifty-six days for women and one hundred ninety-two days for men.

Q All right.

I think the Court will take notice.

We are submitting this on page seven, this table. The

Court will be ready to recognize that this is put out by the National Center for Health Statistics, U. S. Government.

THE WITNESS: Yes, sir. Based on the survey of forty-two thousand families, including about one hundred thirty-four thousand individuals.

THE COURT: All right.

BY MR. HIRSCHKOP:

Q I show you two other documents. Would you identify both of them?

A Yes, sir. This is Acute Conditions Incidents and Associated Disability, United States, July 1967 through June, 1968, also by the Public Health Service. It is based on the same survey as the other document.

Q Is it also put out by the National Center of Health Statistics, U. S. Government?

A Yes, sir. That is a part of the Public Health Service.

Q I draw your attention to page nineteen, table ten.

A Yes. This is loss from work for one hundred currently employed persons per year for various conditions.

Now, this particular table doesn't break out pregnancy. It is lumped under all other acute conditions. But there are on the days lost per year, all other acute conditions are 67.1 which would include pregnancy and a lot of others, but it is 107.1.

Q All right.

Would the pregnancy be included within all other acute conditions and would that compare favorably or less than other normal things as injuries, influenza?

A Far less than influenza or injuries.

Q Now, in arriving at your opinions that the status

papers and the opinions that you will render here today, did you also consider these statistics?

A Yes, we did.

Q Would you look at the third document I have given you?

A Yes.

Q What is that document?

A That is especially prepared by the Public Health Service recently. Days Lost From Work Associated with Acute Conditions and Days Lost from Work per hundred per year by sex and condition group, United States, July, 1966 through June, 1967. That is the latest year for which they could have this kind of background that breaks out the pregnancy on the days lost from work.

And they prepared it for me in preparation for this testimony.

Q Okay. Who prepared it?

A The Public Health Service. Mrs. Ethel R. Black, statistical assistant in the analysis and reports branch.

Q Is this more detailed than the other two I have asked you about?

A Yes. It gives more detail on days lost from work. You can see under deliveries and disorders of pregnancy 20.9 days per year per hundred women. This would be one hundred employed women lost from work for this reason; whereas, for fractures, dislocations, sprains and strains it is 45.2 days and for upper respiratory conditions 49.4 days and for influenza 54.5.

* * *

Q Again, in preparing for today and also carrying on everyday duties, did you look into other departments of the

government, United States Government, as to how they did things?

A Yes, I did. The Department of Labor has an agreement with its union which specified that it is up to the women to decide when she will leave.

Q Is this—

A That is it. When she will begin taking leave. When she will be off.

Now, she does have to have a medical certificate if she starts taking leave more than so many days before. I have forgotten the exact number. If she begins leave more than forty-two days before delivery, she has to have a doctor's certificate. And if she continues her absence after the fifty-sixth day, she has to have a doctor's certificate. But within those limits it is entirely up to her.

Q Does the United States Department of Labor under their agreement with their own employees permit an employee who is pregnant to work up until the day of going into labor?

A Oh, yes. That has been common in the federal government for many years, women my age used to have, you know, babies the day after they worked.

Q Now, has the U. S. Department of Labor, Office of Federal Contract Compliance looked into this area?

A Yes. Under executive order 11246 the Office of Federal Contract Compliance is required to investigate complaints of discrimination because of sex in private contractors. And they had to consider this area and did adopt or adopted some guidelines and interpretations.

Q Now, would you take these, going back for a moment to the Labor Department, would you just read into the record what their official policy is rather than clutter the record with that whole document?

A The whole thing?

Q Just the short policy on the ninety days.

A Okay.

"An employee may be absent on leave up to ninety consecutive days for maternity reasons. She may choose how and in what order such absence shall be ordered, sick leave and annual leave or without pay leave to the extent that she has available and annual and sick leave time. She may use all, a part, or none of her available annual or sick leave time. Any absence in excess of available annual and sick leave time will be recorded and treated as without pay. The employee may also choose when these ninety days of absence will begin. On the employee's request and personal certificate absence will be charged to sick leave time to the extent available."

Q Okay. That is fine.

Now, counsel has a copy of this and I am sure you will want to cross-examine.

Did you look into the office of federal contract compliance?

A Yes.

Q Would you tell me what do they do, very briefly?

A Well, there is one question here I think spells out the issues before this Court.

Q Before you read that or read from that, what is the document to which you refer?

A Memorandum to heads of agencies.

Q From?

A John L. Wilkes, Director of office contract compliance, U. S. Department of Labor, dated November 12, 1970, and the subject is questions and answers concerning sex discrimination guidelines.

Q And to the best of your knowledge and according to your research is this now the official policy that is being followed by the office of the federal contract compliance, U. S. Government?

A Yes, sir, it is.

Q What is that policy on this maternity leave?

A This question ten spells out the situation. "May contractor specify the time when maternity leave shall begin?" And the answer, "Not normally. This is primarily a medical decision which is not reasonable for a contractor to make in terms of a blanket policy. The time when a woman leaves before childbearing is normally a matter between the pregnant employee and her doctor."

Q Did you look into the policies of the Department of Defense?

A Yes, sir. The Department of Defense employs a large number of school teachers overseas and in the dependency schools, in fact, I think well over six thousand employees totally.

Q In the teaching profession?

A In the school teachers and principals and secretaries and so on.

Q What is the official policy of the U. S. Department of Defense with regard to maternity benefits?

A Well, maternity—there is no specification as to how long a woman has to be off. The leave that a teacher accumulates can be used for this purpose as well as for illness or for personal emergencies and so on.

Q Is there any directive in the Department of Defense as to when their teachers must take leave?

A No, there is not.

Q May they, according to your research, work up until the time of labor in the Department of Defense schools?

A As long as they are performing their duties adequately they could.

Q And did you also look into the requirements of the Department of Health, Education and Welfare with regard to its employees?

A Yes, sir. I called. I didn't have the time to get their official public statement, but I called and talked to the personnel people there and they said that they had laid down no rules, no blanket rules about when an employee had to quit.

Q All right, Mrs. East.

With regard to all these documents and research you have done and position papers, do you know of any reason why, professionally, a woman should be terminated in teaching or any other employment with the same type of physical requirements because of pregnancy?

A Well, none whatever.

* * *

[TR. PP. 81-84]

CROSS-EXAMINATION

Q Mrs. East, you have examined the Chesterfield County personnel manual?

A No, sir, I have not.

Q So you are not aware of what the maternity leave policy of Chesterfield County is in this case, is that correct?

A Well, I have gathered this morning from being here and from what I knew about the case before.

Q But you haven't informed yourself of the issue that is before this Court?

A I know about the issues before the Court.

Q As it relates to Chesterfield?

A As it relates in this case.

Q All right.

A It is a fairly common policy. I have investigated some other schools.

Q Now, this one Department of Labor, this is employment contract, isn't it, this exhibit?

A Agreement with the union. The federal government does not enter into contracts with unions as private employers do.

Q Yes, ma'am.

This agreement contains a specific provision relative to maternity leave, does it not?

A Yes, sir.

Q And this specific provision has been approved by the Department of Labor, United States, is that correct?

A Yes, for its own employees.

Q So to the extent that you have been referring to the Acute Conditions and to these other statistics that you have referred to here this morning; the contract doesn't specifically apply to any of those, does it? Only to maternity leave, is that correct?

A For the same, there has been some question, I think, about maternity leave.

* * *

Q What would you say, Mrs. East, insofar as an employer is concerned, is the basic difference between, other than the obvious difference, but the basic difference between the man that breaks his leg on the job and the woman that gets pregnant is what?

A None whatever as far as the employer is concerned.

Q Well now, would it be fair to say that one difference is certainly this: when you are dealing with maternity you know when it is going to happen, don't you? In other words, when a woman goes to her doctor she knows that on such and such a date she is going to have a baby?

A Approximately.

Q Is that true?

A Approximately. Within limits.

Q Now, in addition to all of the days that employees lose, as has been surveyed by the documents which you have or which Mr. Hirschkop has introduced through you to the Court today, in a school board such as the Chesterfield County school board they have to cope with all these unsuspected absences, wouldn't that be a fair statement, they don't know, I mean, when a man goes skiing for a weekend and he breaks his leg and comes in—

A That is true of all employers, yes.

Q But it is not true of someone who becomes pregnant, is it?

A That's right.

Q So when someone becomes pregnant you have an opportunity at that time, and particularly in the teaching profession, you have an opportunity at that time to determine when she is going to stop employment so that you can prepare in an orderly fashion for someone to come behind her and take over where she leaves off, is that fair?

A I say she might be in a position to determine with her doctor when she should. I don't know that the school board should be in that position.

* * *

[TR. PP. 87-93]

Q Mrs. East, what you are saying now is, I think, and you correct me if I am wrong, but what you are saying now is that pregnant women think they are entitled to special benefits even though the Department of Labor and the Courts and everybody else might not think so, but they certainly think that they are entitled to special benefits, isn't that a fair statement?

A No, sir, I don't think pregnant women are and I think council recommended against any special benefits. We don't want pregnant women to have any more benefits than a woman with any other kind of disability or a man with any other kind of disability.

Q Not even when it is a benefit that can be foreseen? I mean it is not like the man with a heart attack. You agree with that at least?

A For purposes of economic job related purposes I see no difference.

Q No difference at all?

A No, not as far as the employer is concerned.

* * *

Q Now, how does this—are these maternity leave provisions, would you say, what you have run into in your wide experience before? I mean generally speaking.

A Well, they seem to be fairly common to school boards. I was rather shocked at what I found at school boards. I don't think this kind of policy is common to other employers, that a woman has to take off this long before childbirth. The only other cases that come to my attention are court cases that involve the Texas Employment Commission that required women to take off two months before and that seemed to me unreasonable, but I had never realized until

we got involved with schools how many schools did this kind of thing. I couldn't understand it. It seemed rather strange. I thought it kind of went back to the days when pregnancy was considered to be obscene or something that shouldn't appear in public after she showed.

Q Have you make any—in other words, in your experience as I understand it, it has been with employment opportunities generally?

A Yes.

Q Not specifically?

A Specifically with schools?

Q Within the teaching profession.

A I went into it thoroughly when I heard about these cases and I was shocked to find that the school systems seemed to be a little bit behind other people.

Q Behind in what way?

A In the sense of denying the woman opportunities to earn money for longer periods of time.

Q You don't think that this agreement recognizes the same?

A Definitely not, sir. It says a woman can work up until the day the baby is born if she is able to perform.

Q You don't think there are two sides of the same coin? You don't think maternity leave—well, let me put it this way.

A I would rather work for the Labor Department than the school board, I would tell you that, sir, looking at the maternity leave policy.

Q Then you would be in favor of no maternity leave policy?

A Definitely, sir. It is only because some people have treated these other cases differently that you need one now, to say certain things aren't true that used to, you know, it should be treated exactly like any other temporary disability.

Q And shouldn't any special provision be made for motherhood, is that correct?

A No, sir, none whatever. The special provisions have hurt women, they have not been protective. They have been discriminatory. All the special provisions we have ever found in law relating to employment and maternity have been discriminatory. I think a lot of people like to believe they are protective.

* * *

JOHN R. KOPKO

was called as a witness by and on behalf of the plaintiff and, having been first duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

By Mr. HIRSCHKOP:

Q Please state your name.

A John Kopko.

Q Your address?

A 302 Biltmore Drive, Colonial Heights.

Q What is your position?

A Principal, Midlothian High School.

Q Mr. Kopko, was Mrs. Cohen a good teacher at Midlothian?

A Yes, she was.

Q Now, could I see Plaintiff's exhibit number four? Mr. Kopko, do you recognize this letter?

A I do.

Q Is this the letter you sent to the school board in question?

A It was.

Q Would you please read the letter?

A "In reference to your letter of November 6, 1970 concerning Mrs. Susan Cohen, Mrs. Cohen's effective resignation is December 18, 1970. I would like to request she be permitted to remain until the end of the semester, January 21, 1971. Mrs. Cohen has been in good health up to this time and I feel she will prove effective in her position up to the January 21 date."

Q Thank you.

Mr. Kopko, should Mrs. Cohen return to work would you be willing to have Mrs. Cohen back at Midlothian as a school teacher?

A I would.

* * *

[TR. PP. 100-101]

H. GILPIN BROWN

was called as a witness by and on behalf of the defendants and, having been first duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

By MR. MASON:

Q Will you please state your name?

A H. Gilpin Brown.

Q Where do you reside?

A 8829 Elmer Road, Richmond.

Q By whom are you employed?

A Chesterfield County schools.

Q In what capacity?

A I am a mathematics teacher at Midlothian High School?

Q How long have you held that position?

A This is my fifth year.

Q Do you hold any other positions pertaining to your occupation?

A Well, I am mathematics department head at school. I am a member of the Chesterfield Education Association and chairman of a standing committee which is entitled, Professional Rights and Responsibilities Committee.

Q How long have you been chairman of that committee?

A This is my second year.

* * *

[TR. PP. 103-105]

THE COURT: In other words, the function of your committee is to assist teachers in their, primarily teachers, I know there are others too, but teachers in their relationships with the school officials in the matters that your committee deems to be meritorious? I take it if you had a hearing and you decided they ought to have fired him three months before you wouldn't bother to do anything else, is that right?

THE WITNESS: We would still send our findings and recommendations to the school board, saying that we believe you were justified in your action.

THE COURT: All right. But if you wrote and said, we don't think you were justified, you would hope that they would follow your recommendation.

THE WITNESS: Yes, sir, that is correct.

* * *

Q Has your committee ever considered a proposal for a change in the absent leave policy of Mrs. Cohen?

A Yes, sir, they have. A lot of people, or a few people that were concerned about this policy came in to a C. E. A. meeting, in a building representative's meeting, and asked that the Professional Rights and Responsibilities Committee look into this situation. We did. And we, the committee, got together and drew up a policy and submitted it to the school board.

THE COURT: When you say this situation, are you talking about general leave and disability?

THE WITNESS: No, sir, maternity leave.

THE COURT: Oh. Talking specifically—

THE WITNESS: Yes, sir, maternity leave. I am sorry.

* * *

[TR. PP 107-116]

Q Well, did your committee hear from the teachers within the school system concerning the formation or formulation of this policy?

A No, sir, we did not. You mean did we have a—

Q Did you invite anyone to come in and express their views?

A No, sir, we didn't.

Q And it did not go through the executive committee, is that right?

A No, sir.

Q Does your committee consist both men and women teachers or all women?

A Men and women.

Q Can you give us a breakdown as to the number of men and women?

A I would say it is about probably sixty-four men, maybe.

* * *

Q What is the official policy of the P. R. R. Committee and the V. E. A., the Virginia association?

A I am not sure about this, but I did talk with them and we drew up this policy.

Q What about the National Association of Education?

A I don't know, sir.

Q If the National Education Association took an official stand diametrically opposed to this local county C. E. A. resolution would that affect your judgment as to the reasonableness of it?

A It would affect the judgment. We would have to have a committee hearing and decide.

* * *

Q So they are diametrically opposed to your stance?

A Well, maybe they are, yes, sir.

Q Well, how about the American Association of University Professors, are you aware that they oppose it?

A No.

Q How about the Society of Professors, a national society, are you aware of their position or the A. F. Q. or the U. F. Q., any of the major teacher associations in the United States. Are you familiar with their positions?

A I am not.

Q In reaching this position, then, your committee made no effort to find out what happens in other places, other

than school systems of a like nature to your county school system?

A We did not.

THE COURT: Did you do that?

THE WITNESS: What is that?

THE COURT: Did you check with other systems?

THE WITNESS: Well, we knew what the—we knew that the Richmond and Henrico, at least members of the committee stated that they thought that it was parallel to ours. Now, we did not go out and write a letter or call them up, but members of the committee thought it was parallel to ours.

THE COURT: May I ask you this? It may be a reason, I just don't think anybody has asked you yet, but I want to know. What is the rationale about choosing four months or six months or seven months or three months or two months? I mean, what was the basis of picking a particular time, if you know?

THE WITNESS: Of our decision you mean?

THE COURT: Yes, sir.

THE WITNESS: Well, we felt that if there were some committee members that felt it should be—that it should terminate at four months and there were some that said it should erminate at four months completely.

THE COURT: But can you tell me why? What was the rationale?

THE WITNESS: Well, the rationale was that the sickness—

THE COURT: Sickness?

THE WITNESS: Yes, sir.

THE COURT: Did you have any testimony that there was sickness associated? Because all the evidence before me is that there isn't, that the sickness is all gone by four months.

THE WITNESS: Well, our committee thought there still was some sickness involved. This is our committee. We did not have testimony from medical doctors. We felt also that the health of the mother, especially in elementary schools where they have to run around quite a bit and this kind of thing, might be impaired.

THE COURT: Did you know that this is really diametrically opposed to everything the doctors have said in this case so far?

THE WITNESS: No, sir. We might have known that.

THE COURT: All right, sir.

BY MR. HIRSCHKOP:

Q Did you make any effort at all to determine what the medical evidence was?

A Not professionally, no, sir.

Q There were no doctors on your committee?

A No, sir.

Q So this is more or less an action of your committee that four months or six months is good, isn't that correct?

A Yes, sir.

THE COURT: May I ask one other question? What prompted this?

THE WITNESS: What prompted the four months?

THE COURT: No. What prompted you even considering this particular matter?

THE WITNESS: It was brought up in a building representative's committee—building representative's meeting of the C. E. A. and the Professional Rights and Responsibilities Committee of which I am the chairman was asked to look into it.

THE COURT: Anything to do with this case or was it some other matter that came up or a teacher had a grievance or thought she had?

THE WITNESS: It was several teachers who had a grievance.

BY MR. HIRSCHKOP:

Q Are you familiar with the fact that the state community college systems for all of Virginia does not have such a leave policy at all?

A I am not familiar with that.

Q Are you familiar with the fact that the Arlington Education Association takes a stand different to your own?

A No, sir.

THE COURT: Are you going to put on some evidence to support these positions or are these hypotheticals?

MR. HIRSCHKOP: Yes, sir. I am reading now from leave policies, which is—

THE COURT: That is all right. I just want to know because so far I haven't paid any attention to your question under the theory that it really isn't evidence before me just because you say it or suggest it.

MR. HIRSCHKOP: I have to admit, Your Honor, the community college is only prompted by a conversation I had with someone at lunch.

* * *

MR. HIRSCHKOP: So in summary the committee made no effort to get competent medical testimony or competent statistical evidence or competent evidence from any of the national organizations as to what should be done here, is that correct?

THE WITNESS: That is correct.

* * *

[TR. PP. 118-120]

DIRECT EXAMINATION

BY MR. MASON:

Q Mr. Eanes, would you please state your full name, please?

A Robert Leslie Eanes, Jr.

Q Where do you reside?

A 12137 Chestertown Road, Chesterfield County.

Q By whom are you employed?

A County of Chesterfield.

Q In what capacity?

A County fire chief.

* * *

MR. MASON: Are they immune from fires?

Have any fires occurred in Chesterfield's school system in 1970?

THE WITNESS: Yes, sir, they have. Six in 1970.

BY MR. MASON:

Q Did any fires occur in schools in Chesterfield County in 1969?

A Five.

Q Any fires occur in 1968?

A Three.

Q What about 1967?

A Six.

Q Have all these fires—were there any serious fires?

A Yes, sir. There were some serious fires in this twenty that I have listed.

Q Anybody get injured?

A No, sir, not to our knowledge.

*MR. MASON: That is all. Thank you.

* * *

ROBERT F. KELLY

was called as a witness by and on behalf of the defendants and, having been first duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

By MR. MASON:

Q Will you please state your name, please?

A Robert F. Kelly.

Q Where do you reside?

A 4901 Southmore Road, Richmond, Virginia.

Q Are you employed by Chesterfield County school system?

A Yes, sir.

Q In what capacity?

A Division superintendent.

* * *

[TR. PP. 127-135]

Q Well, under what rule the pregnant teacher can give the notice anytime up to six months?

A That is correct.

Q What about your understanding of paragraph 5(c)(1), maternity leave must be requested in writing at the time of termination of employee?

A Well, as we said—

Q Does that mean that she has to wait until the day of termination before she can give the notice?

A No. She may give the notice at any time from the first letter when three months' pregnant up to the term when maternity leave commences.

Q As a matter of fact, wouldn't you prefer to have it prior to the date of her actual termination?

A Yes, indeed, in the case of Mrs. Cohen, she asked for it in her first letter.

Q Now, you heard the testimony of Mrs. Cohen this morning, testimony that she missed a number of days. When you add those up it comes to ten. She was absent from October 1 through December 11. Do you know how many school days there are, teaching days, between October 12 and December 11?

A Approximately forty.

Q Forty teaching days. And Mrs. Cohen missed ten of those forty teaching days?

A She did.

Q Do you consider that to be excessive absence?

A I would think so.

Q Does the excessive absence of a teacher—let me rephrase that question.

Does the quality of the education of the students diminish directly in direct proportion to the days' absence of a teacher?

A I think professionally that there is a direct relationship between the continuity of the teaching from one teacher

to a substitute teacher and that when there is major interruption of the teaching process that the students in the particular classrooms suffer. I don't know the percentage, but I do feel that they suffer from not having continuity of teaching.

THE COURT: Mr. Mason, for the Court's benefit, would you tell me the purpose of it? I am not suggesting you not continue, but I want to know the purpose of this.

MR. MASON: The purpose of that question?

THE COURT: Yes, sir.

Well, let me tell you what runs through my mind. Isn't it immaterial, unless it had to do with her pregnancy?

MR. MASON: Your Honor, a teacher is employed to teach children and if it affects the quality of their education, I think the school board—

THE COURT: Listen to my question first. Isn't it immaterial in this case, any absence which, as the doctor says, were excessive in his opinion, isn't that material unless it had to do with pregnancy so far as this case is concerned? Because you have already stipulated she is an excellent teacher.

MR. MASON: But it still has the bearing on the quality of education that the children are getting.

THE COURT: What is the materiality in this particular case?

MR. MASON: Your Honor, we are talking about a school system that employs approximately fourteen hundred teachers and when you get excessive absences—

THE COURT: But that is not why she is not teaching

because of any alleged excessive absences, is it? I don't see the materiality in this particular case.

Go ahead. Maybe there is something I am missing.

MR. MASON: Excessive absence is one of the factors for the rule.

THE COURT: But is there any evidence that the pregnancy brought on the excessive absences? That is the whole point. Do you expect to put on evidence like that?

MR. MASON: We are talking merely about absences, whether it is pregnancy connected or not.

THE COURT: Would you fire her if she had an accident and her leg was injured and she missed ten days?

MR. MASON: No. She would get sick leave.

THE COURT: Would you call it excessive?

MR. MASON: She would get sick leave.

THE COURT: But it still would be excessive, wouldn't it, ten out of forty days?

MR. MASON: Yes, sir.

THE COURT: So I don't see the correlation. Go ahead.

MR. MASON: I asked the question primarily because it affects the quality of education.

THE COURT: I will take notice that children's education, I think, and you correct me if I am wrong, Dr. Kelly, certainly getting a better education when they have the same teacher every day as distinguished from substitutes, isn't that correct?

THE WITNESS: Very clearly.

Q Dr. Kelly, isn't one of the main reasons for the giving of notice and asking for maternity leave to provide continuity in the turnover and change of personnel teaching?

A Yes. It is our main ingredient.

MR. HIRSCHKOP: Pardon me. It is too late to correct this, but on something this vital I would just as soon he not lead that directly.

THE COURT: Overruled. It saves time. He is not going to put words in Dr. Kelly's mouth. Don't you think he is. Go ahead.

MR. MASON: Would you answer the question, please?

THE WITNESS: Would you please repeat the question, Mr. Mason?

By MR. MASON:

Q Isn't part of the reason for the provision which the maternity leave is to give notice in writing and request maternity leave to provide continuity within the school system for the change of personnel?

A Yes, sir. This is the main thesis behind the maternity leave. If we wish and hope to continue the continuity of teaching, there is a point about which we would like to know that a teacher is going to leave so that we can start looking for a qualified replacement for that teacher.

Q Does the fact that teachers are human and report in sick now and again, does that create any confusion for the school system?

A Well, yes, it does, for the individual school principal; because he is responsible for replacing that teacher that particular day, and in some cases the principal has the responsibility that morning, if the teacher calls in sick, of replacing a substitute. And something about this particular

time, it is very difficult to find substitute teachers, so it does cause some disruption of the teaching process.

Q How many teacher are employed at Chesterfield County school system?

A If you count all of the teachers, not just classroom teachers, around fourteen hundred.

Q And of that number how many, if you know, are women?

A I don't know the exact number, but it is about eighty per cent women in Chesterfield County and again—

Q Eighty per cent?

A About eighty percent. Eighty-twenty.

Q And the range of schools in Chesterfield system begin where and end where?

A Kindergarten through twelfth year.

Q What is the present age of kindergarten children?

A Five.

Q What generally would be the age of a student in the senior year of high school?

A Anywhere from at the senior level sixteen through possibly even nineteen.

Q Did you have or was there submitted to you a report of absences pertaining to pregnant teachers some months ago?

A Yes, sir, there was.

Q Was this information used by you in maternity leave requests?

A Per se, no.

Q Did you use this study or this information pertaining to any case at all?

A No.

Q Do you recall what the information was that this study provided?

A Mr. Mason, would you clarify for me "study"? Because we have a number of studies and I have been caught in this trap before.

Q After this case came into existence, I am talking about a report or information that was compiled pertaining to pregnant teachers prior to this.

A There was a study conducted by the personnel department for the 1968-69, 69-70 and 70-71 school years of all pregnant teachers, not only those who had requested maternity leave, but who were pregnant and did not request maternity leave.

Q I am not getting into that yet. I am going back to the original one which frankly none of us knew was in existence.

A All right. The original survey conducted by Mrs. Shirley Stoncham of elementary teachers who were pregnant and had requested maternity leave.

Q What did this information tell you pertaining to pregnant teachers?

A It indicated that during a period following the year of pregnancy that they had, this group of teachers, and offhand I don't remember the number, but this group of teachers had some fifteen days of absences. During the same months the following year in their third, fourth and fifth months of pregnancy, they had some forty-five days of absences. Again, it is completely a study and not a statistical thing in nature, but it did indicate at that time that these teachers were having excessive absences over a similar period, but again, not proof that it was due to pregnancy.

Q All right.

Isn't it important for the school to know in advance if it can when a teacher is pregnant?

A Yes. I think it is because even though we, at the present time, have a surplus of teachers there are still certain areas and certain subject areas that are very difficult to replace. Also, my main problem is of continuity of education, progress, to get a new teacher into the classroom as soon as possible so that that education does continue and we don't have a break.

* * *

[TR. PP. 137-144]

Q Dr. Kelly, what specifically was your approach in connection with Mrs. Cohen?

A Well, I believe, and I hope I am correct, that Mrs. Cohen wrote sometime in October, I believe, about October 26, requesting maternity leave and asking to remain on as a teacher until, I believe, April 1st. This is not in line with the school board regulations. She was told that she would leave at the end of the fifth month which at this particular time happened to run around December 18:

Another request came in from both Mrs. Cohen and the principal requesting that she be able to remain until the end of the first semester, which would have been around January 21. In consultation with the personnel department it was determined that by happenstance we had an applicant with a master's degree and experience equal to Mrs. Cohen, that we could hire the person right after the Christmas vacation, and it was felt at that point that that would be better for the students and the continuity of the program. And her request was denied.

At that point Mrs. Cohen wrote, and I asked—I believe called me, and wanted to know what steps she could take.

I told her if she wished she could come before the school board, which she did, I believe, on the 25th of November. This was not a hearing.

As we stipulated before it was a personal plea on the part of the teacher to the school board.

At that time she again reiterated her statement that her doctor and principal had requested that she remain until the end of the semester. The school board stayed within their reasonable policy and denied her.

Q You do have authority, do you not, under this policy, to extend a pregnant teacher?

A Yes, I do; and I have.

Q What generally is the basis under which you would extend a pregnant teacher?

A The major consideration is the student in the classroom. I keep on saying the continuity of the educational program. In many cases we cannot find a replacement and based on the recommendations of the personnel department we then let the teacher stay on until the end of a semester or the personnel department can find a replacement.

Q Do you know when the present personnel policy manual was accepted by the board?

A I do not. I was not superintendent at that time.

Q This was prior to your time?

A Yes, sir.

Q You didn't have anything actually then to do with the formulation of this policy?

A I did not.

* * *

Q Dr. Kelly, you refer to section 22-217.5 of the Code of Virginia which sets forth conditions under which a contract may be terminated. It does set forth one of the things is incapacity or something shown by competent medical evidence, isn't that correct?

A That is correct.

Q Why did you seek competent medical evidence with regard to this policy of maternity?

A Mrs. Cohen wasn't being terminated or dismissed under this. That policy is strictly dismissal.

Q But you realize that the state has suggested in there that competent medical evidence might be sought where at least that involved termination of employment, whether it is permanent or partial?

A No, I don't read it that way. It says termination, to me is dismissal.

Q All right.

You also said that the state basically runs the schools. Are you not familiar with Article 9, section 133 of the state constitution which says the school board has jurisdiction over that school?

A If I said what you said I said—

THE COURT: I don't think you said that.

THE WITNESS: I hope I didn't.

MR. HIRSCHKOP: I have tried to take notes, Your Honor.

BY MR. HIRSCHKOP:

Q You also said that Mrs. Cohen missed ten days. You know for a fact at least three of those days were for business or religious holidays?

A I know two.

Q Two.

Now, do you have any way of knowing what the other days were for?

A No, I do not. As I just do not—they are for illness, and all the teachers are required to put down is illness.

Q When Mrs. Cohen appeared before the school board, did you make any attempt or any member of the board make an attempt to determine why she was absent those days prior to her appearance?

A That was not the consideration for not extending Mrs. Cohen's maternity leave.

Q Okay. The basic reason you gave on your direct evidence for this policy was a continuity for change of personnel. You said at least two separate places that was the reason. Your testimony was that that was the main reason; is that correct?

A That is true.

Q Was that the main reason when we deposed you? Do you remember being deposed?

A I do.

Q And do you recall what you told us at that time?

A I am not exactly sure of my words, since there were fifty-seven or seventy-five pages.

Q We discussed absentism. Do you recall that?

THE COURT: Refer to the page now.

THE WITNESS: Yes, sir.

By MR. HIRSCHKOP:

Q I refer to page sixty-one at the conclusion of this discussion after absentism.

"Question: What is the rationale of this policy?"

"Answer: The rationale is that at a certain point in a

term of pregnancy a woman becomes physically dependent upon services of a doctor, becomes physically open to harm from students pushing."

"Question: Is there any other rationale? Are they the only two?"

"Answer: All I can think of."

* * *

Q The main reason, it just slipped your mind and yet, twelve pages further on in the deposition do you recall this question and answer. Page seventy-three.

"Question: These are the reasons you have for the policy?"

"Answer: That is right. Well, let me clarify it. They are my interpretation of the policy; the policy was written before I arrived.

"Question: But do you know of any other reasons if you were asked now cold to produce a policy, these are the basic reasons?"

"Answer: At this point, yes."

Was that a truthful answer at that time?

A Yes, sir.

* * *

[TR. PP. 146-147]

THE COURT: What he is suggesting is that that is a reason that occurred to you primarily because of this litigation as distinguished from the reason for the policy. Is that fair?

THE WITNESS: That is a fair statement.

* * *

[TR. PP. 155-158]

Q Does Mrs. Stonham's show anything different?

A No, it does not. We do not have a teacher on board after the fifth month.

Q Then you have no way at all of knowing, do you, what the absentee rate would be after the fifth month?

A I do not.

* * *

Q You have had teachers on occasion teach past the fifth month of pregnancy, haven't you?

A We have.

Q In fact, up until December of this year the policy was to let substitute teachers teach much farther than the fifth month, was it not?

A To let substitute teachers?

Q Yes.

THE COURT: You mean who are expecting, is that what you are talking about?

BY MR. HIRSCHKOP:

Q Yes. Pregnant substitute teachers were allowed to teach past the fifth month?

A If we could not find a replacement for that teacher.

Q What did you do with them during fire drills?

A I suppose they handled themselves exactly as they would handle themselves at any given time.

Q Do you have any reason to believe from any observation or study that a teacher or teachers that were pregnant would handle themselves different than any other teacher?

A We do not have empirical data, no.

Q Now, with regard to illness or other teachers, for instance, if a teacher had a kidney operation, what would guarantee when that teacher returned to school?

A When the teacher felt well enough to return to school.

Q How about a teacher with a broken leg or leg in a cast?

A Similar answer.

Q And this is true of other physical infirmities with the exception of pregnancy, if that is a physical infirmity or disability?

A I don't see it as a physical infirmity. I don't think it is in the same baliwick.

Q Why is it different?

A Because I think the person with the broken leg remains in the school and I do not have to worry about when the termination of a contract takes place and the replacement of that teacher. With the pregnant woman I do. I am concerned for the welfare of the student and the welfare of the school system. And if the teacher can remain up to a point where she feels she can leave, then I am faced with the proposition of hiring a new teacher within a given fifteen or twenty minutes.

Q And this is a strong concern on your part, is it not?

A Yes, as I think back on it, yes.

* * *

[TR. PP. 160-168]

THE COURT: Why are you so concerned with the doctor saying she can come back afterwards and apparently, you don't give much consideration to what the doctor says before, Dr. Kelly?

THE WITNESS: No, we do give consideration to what the doctor says before.

THE COURT: Well, is it fair to say you didn't, in Mrs.

Cohen's case? Because the evidence I have here today is the doctor said she could keep right on working.

THE WITNESS: My answer is, I gave consideration to it. I felt the overriding factor was we had a teacher that could replace Mrs. Cohen.

THE COURT: But the distinction is afterwards, that is it, the doctor says she can come back to work and as I understood your testimony, she can come back.

THE WITNESS: That is true.

THE COURT: But not before that, she couldn't continue to work.

THE WITNESS: That is true.

THE COURT: So you put more importance on what he says afterwards than you do before, is that fair? Well, that is probably not a very good phrase to say importance, but you gave more weight to it after the fact than before it?

THE WITNESS: It would appear we do.

THE COURT: All right.

BY MR. HIRSCHKOP:

Q Now, if she returns to work the day after, who does she teach? Does she go back to the old class?

A No, she does not. She comes back in a position that would be open at that point.

* * *

THE COURT: Do you know what was magic about that particular time?

THE WITNESS: All I know, Judge, is that the school board had a policy that to me was reasonably in line with what I at that present time knew, it was in line with the

school systems I had been previously with, and it was their policy. I adhere to their policy.

THE COURT: Dr. Kelly, let me ask you this. It hasn't come up yet, but most, well, perhaps not most, I don't know, but pregnant women, I guess most, ultimately show. I mean, it is obvious that they are pregnant. Does that have anything—is that any factor? Are we way back in the Middle Ages where there was some stigma of obscenity to a perfectly natural, normal, wonderful thing.

THE WITNESS: Judge Merhige, I would hope that is not the reason.

THE COURT: You don't think that has anything—

THE WITNESS: No, I don't believe it had anything to do with this policy of four months. I don't know exactly the rationale behind it, four months over any other time limit, but I believe that it is a policy that is reasonable at this point.

By Mr. HIRSCHKOP:

Q Well now, are you familiar with Mr. Curtis?

A Yes, I am. He is on the school board.

Q School board member?

A Yes. Brand new school board member.

Q Are you familiar with the fact that one of the reasons he gave is he thinks the appearance of the teacher, for one thing?

A Yes. I read his deposition.

Q Are you familiar with Mr. Wells?

A Yes, I am.

Q You will have to speak up so the court reporter can get it.

A Yes.

Q Are you familiar with Mr. Wells's statement that, yes, because some of the kids say the teacher swallowed a watermelon and things like that, that is not good for the school system? Are you familiar with his testimony to that effect?

A Yes. I read his deposition.

Q How many members on the school board?

A We had six. Now five.

Q So forty per cent of your school board at least thinks it is appearance, do they not?

A Yes, sir.

Q And yet when I asked you about this policy on deposition you said, you follow the policy of the school board, you referred to their reasoning on it, did you not?

A Of the original policy, yes, I still see no reason why the new superintendent should change the policy at this point. I would think it is unreasonable.

Q You would concede if Mr. Wells's sole reason was, as he stated, that the kids might think she had a watermelon in her belly, it would be arbitrary, not talking about legal, but professionally you would know of no reason that would have validity?

A No, I don't.

Q A watermelon in the belly and the other who was asked about the appearance, that has nothing to do with it?

A It does not, no.

Q So if the school board or a substantial part used those reasons they would be arbitrary in a professional sense, would they not?

A They are not professional educators.

Q That may be the problem.

* * *

Q Dr. Kelly, that school system in the State of Virginia, if you can recall, has a policy identical or similar to Chesterfield County?

A In the survey or in the study that I did of the V. E. A. survey of maternity leave provisions in the State of Virginia, I don't have the percentages, Mr. Mason, but I would say that well over sixty per cent of them run within a four months' bracket. Again, I don't know if sixty per cent is right, but a majority of the school systems, I believe, have four months or after the fifth month of pregnancy.

Q And this prevails predominantly throughout the State of Virginia?

A I believe as of that survey that Mr. Hirschkop is going to present—

MR. HIRSCHKOP: I am sorry, Your Honor. It is new and I will be brief.

FURTHER RECROSS-EXAMINATION

By MR. HIRSCHKOP:

Q Some do have a policy, however, where the teacher can teach up until the time of labor if she wants to, do they not?

A I read the survey and I did not see that, Mr. Hirschkop. I am sorry.

THE COURT: Well, doesn't it speak for itself and in the exhibit; don't you have an exhibit that shows?

MR. HIRSCHKOP: Yes, it does.

THE COURT: Well, I am a good reader.

MR. HIRSCHKOP: Thank you.

I will identify it for the Court. It is not numbered, but three leaves from the end, six pages back from the end, is a two-page table.

Just one further thing. Some of them have three months on this table, do they not?

THE WITNESS: They do.

MR. HIRSCHKOP: And some four months?

THE WITNESS: They do.

MR. HIRSCHKOP: And some five months?

THE WITNESS: They do.

BY MR. HIRSCHKOP:

Q Some six months?

A I believe six is the limit.

Q Which is more reasonable? Three, four, five or six months?

A I think it depends upon the particular situation in the judgment of the school board and the policy that they are presently working under.

Q How do these non-professional people, as you termed them before, go about deciding between three, four, five or six months?

A I am sure in this particular case the superintendent of schools, whether it was Dr. Cohen or Mr. Thompson made the recommendation to the supervisors years ago.

Q In the deposition of the school board members every one of them said—you said you read the deposition, everyone said that, we strongly rely upon the recommendation of the superintendent.

A That is true.

Q That is you in this case?

A That is true.

Q How do you go about choosing in your mind as a professional educator the various degrees between three, four, five and six months?

A Mr. Hirschkop, I don't know if there is a basic answer to that question because I think, as you look around the country, you do find four, five, six, seven months. Two, three, four, five, six months. The variance seems to run from school system to school system. I think the rationale depends upon the individual school system and not the state or the country at this time.

Q But other than pure capriciousness can you cite any reason why one school district would differ from the very next school district and why King and Queen should differ from Henrico and why Alexandria should differ from Arlington and Richmond should differ from Henrico?

A I don't think it is capriciousness.

Q Can you, as a professional educator, cite one reason why it should be such a distinction from county to county?

A Because each school system is an agent unto itself and sets its own regulations and its own policies.

Q Other than the fact that it sets its own policies, what would differ from neighboring systems to neighboring systems that would make them have a different policy or set a different policy? What factors can you think of?

* * *

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Case No: 71-1707

Docket Entries

Appeal from the United States District Court for the
Eastern District of Virginia, At Richmond.

DATE	FILINGS—PROCEEDINGS	FILED
7/27/71	Record on appeal in one volume (Vol. I) filed and appeal docketed.	
7/27/71	Transcript of proceedings in two volumes (Vol. II and Vol. V) filed.	
7/27/71	Exhibits in one envelope received from the clerk of the district court at Richmond, Va. (Vol. III)	
7/27/71	Deposition of Dr. Leo J. Dunn in one volume (Vol. IV) received from the clerk of the district court at Richmond, Va.	
8/3/71	Appearances (3) for the appellants filed and entered.	
8-6-71	Designation of parts of the record to be included in appendix to brief for the appellant received and filed.	
8/12/71	Appearance for the appellee filed and entered.	
8/12/71	Appearance for the appellee filed and entered.	
8/12/71	Depositions of C. Douglas Spencer received from the clerk of the district court at Richmond, Va.	
8/13/71	Appellee's designation of parts of record to be included in appendix filed.	
8/20/71	Amended designation of parts of the record to be included in the record for brief of appellant's filed.	
8/30/71	Supplemental designation of joint appendix filed.	

App. 126

- 9/7/71—Brief for appellant filed. 25 copies.
- 9/7/71—Joint appendix filed. 10 copies.
- 9/7/71—Aid to Court filed. 25 copies.
- 9/28/71—Motion for extension of time to file appellee's brief, filed.
- 9/28/71—Order extending the time to file appellee's brief to November 5, 1971 filed.
- 11-3-71—Appellee's motion for further extensions of time for filing appellees brief, filed.
- 11-3-71—Order extending the time to file appellee's brief to November 10, filed.
- 11/9/71—Motion of the U.S. Equal Employment Opportunity Commission for extension of time to file brief as amicus curiae filed.
- 11/9/71—Memorandum of the U.S. EEOC in support of its motion for extension time to file brief as amicus curiae filed.
- 11/9/71—Order granting EEOC leave to file brief as amicus curiae and granting extension of time to file brief on or before November 30, 1971, filed.
- 11/12/71—Brief for appellee filed. 25 copies.
- 11/11/71—Appellant's motion to extend the time to file its reply brief to fourteen (14) days after the brief of Amicus Curiae has been filed, filed.
- 11/12/71—Order extending the time for filing appellant's reply brief, filed.
- 12/2/71—Brief for amicus curiae filed. 25 copies.
- 12/14/71—Reply brief for appellants filed. 25 copies.
- 12-15-71—Notice of oral argument mailed to Gray, Eichler, Hirschkop, Mann, Rudy, Mason, and Gray.

- 1/4/72—Cause argued before Haynsworth, Chief Judge; Winter, Circuit Judge and Young, District Judge, and submitted.
- 1/14/72—Record on appeal in one volume (Vol. I), transcript of proceedings in two volumes (Vols. II & V), exhibits in one envelope, (Vol. III), and deposition of Leo J. Dunn in one volume, (Vol. IV) transmitted to Chief Judge Haynsworth.
- 1/14/72—Discovery deposition of C. Douglas Spencer et al in one volume transmitted to Chief Judge Haynsworth.
- 9-11-72—Record on appeal in five volumes received from Judge Haynsworth.
- 9/14/72—Opinion filed. Chief Judge Haynsworth dissenting.
- 9/14/72—Opinion and Clerk's Memorandum mailed to counsel of record. (Mailed to Mann, Hirschkop, Rudy, Mason, and Gray.) Copy of opinion mailed to the Clerk of the district court at Richmond, Virginia.
- 9/14/72—Judgment of the district court affirmed. Judgment filed.
- 9/28/72—Appellant's petition for rehearing with suggestion for rehearing en banc, filed.
- 1/2/73—Order granting petition for rehearing en banc and case is submitted on briefs and tape of oral argument, filed.
- 1/15/73—Opinion filed. (CFH) Winter dissenting; Craven and Butzner concurring in the dissent.)
- 1/15/73—Copy of opinion mailed to counsel of record. (Mailed to Mann, Rudy, Mason, Gray, Hixon and Clarke.) Copy of opinion mailed to the Clerk of the District Court at Richmond, Virginia.

App. 128

- 1/15/73—Judgment of the District Court reversed. Judgment filed.
- 1/19/73—Appearance for the appellants filed and entered.
- 1-29-73—Appellant's verified bill of costs, filed.
- 2/8/73—Certified copy of the judgment and printed copy of the opinion handed the Clerk of the District Court at Richmond, Virginia.
- 2/8/73—Record on appeal in one volume (Vol. I), transcript of proceedings in two volumes (Vols. II and V), exhibits in one envelope (Vol. III), deposition of Dr. Leo J. Dunn in one volume (Vol. IV) and deposition of C. Douglas Spencer returned to the Clerk of the District Court at Richmond, Virginia.
- 2/22/73—Notice evidencing filing petition for writ of certiorari in the Supreme Court filed. (No. 72-1129) (Filed February 15, 1973)
- 4/30/73—Certified copy of order of the Supreme Court granting certiorari April 23, 1973 filed.
- 5/18/73—Record on appeal in one volume, transcript of proceedings in two volumes, disposition in two volumes and exhibits in one envelope received from the clerk of the District Court at Richmond, Va.
- 5/18/73—Certified record in six volumes and exhibits in one envelope transmitted to the Clerk of the Supreme Court.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. **72-777**

CLEVELAND BOARD OF EDUCATION et al.,
Petitioners

— v —

JO CAROL LA FLEUR et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

Citation to Opinions Below	1
Jurisdiction	2
Question Presented for Review	2
Constitutional Provision Involved	2
Statement of the Case	2
Reasons for Granting the Writ	4
1. The decision below is in conflict with the decision of this Court in <i>Reed v. Reed</i>	4
2. The decision below is in conflict with <i>Struck</i> <i>v. Secretary of Defense</i> , a Ninth Circuit deci- sion presently under review in this Court	6
3. The decision below is in conflict with <i>Schatt-</i> <i>man v. Texas Employment Commission</i> , a decision of the Fifth Circuit	6
4. This Court should squarely decide the im- portant question of Federal Law involved in this case	7
Conclusion	9
Appendix:	
Opinion and Order of District Court	A-1
Opinion of the Court of Appeals	A-14
Order on Motion for Rehearing and Suggestion for Rehearing En Banc	A-26
Certificate of Service	A-26

TABLE OF AUTHORITIES

Cases

<i>LaFleur v. Cleveland Board of Education</i> , 326 F. Supp. 1208 (E.D. Ohio 1971)	1
<i>Reed v. Reed</i> , 404 U.S. 71 (1971)	4, 5, 6, 8
<i>Dandridge v. Williams</i> , 397 U.S. 471 (1970)	5
<i>Goesaert v. Cleary</i> , 335 U.S. 464 (1948)	5
<i>Struck v. Secretary of Defense</i> , F. 2d.; (9th Cir., 1971) 72-178 on the docket of this Court, (cert. granted Oct. 24, 1972) 41 Law Week 3220	6
<i>Schattman v. Texas Employment Comm.</i> , 459 F. 2d. 32 (5th Cir., 1972)	6, 7
<i>Cohen v. Chesterfield County School Bd.</i> , F. 2d., (4th Cir., Sept. 14, 1972, Case No. 71-1707. Mo. for rehearing and suggestion for rehearing en banc pending, Op. below, 326 F. Supp. 1159 (E.D. Va. 1971))	8
<i>Green v. Waterford Bd. of Ed.</i> , 5 Employer Practices Dec. Para. 7979 (D.C. Conn. 1972)	8
<i>Cerra v. School Dist.</i> , 4 Fair Emp. Practices Cases 79 (Pa. Com. Ct.—1972)	8
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971)	8

CONSTITUTION, STATUTES AND RULES

U. S. Const. Amend. XIV. Sec. 1	2
37 Fed. Reg. 6837	8
29 Code of Fed. Reg. 1604.10(b)	8
28 U.S.C. Sec. 1254(1)	2
42 U.S.C. Sec. 1983 (1970)	2
28 U.S.C. Sec. 1343(3)(4)	2
P.L. 92-261; 86 Stat. 103 (1972)	8

TREATISES AND LAW REVIEW ARTICLES

"Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment", 84 Harv. L. Rev. 1499 (1971)	5
"The Equal Rights Amendment: A Constitutional Basis for Equal Rights For Women", <i>Brown, et al.</i> , 80 Yale L.J. 871	5

In the
Supreme Court of the United States

OCTOBER TERM, 1972

No. _____

CLEVELAND BOARD OF EDUCATION et al.,
Petitioners

— v —

JO CAROL LA FLEUR et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit reversing, with one Judge dissenting, a decision of the United States District Court for the Northern District of Ohio, Eastern Division, which had dismissed respondents complaints.

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals is as yet unreported. It is set forth in the Appendix, *infra*, at pp. A-14. The opinion of the District Court is reported in 326 F. Supp. 1208 and is set forth in the Appendix, *infra*, at pp. A-1.

pounds and are subject to fears of miscarriage, difficulty in labor and abnormalities in their child that, in the stress situation of teaching in public school, makes them not as able to fulfill their duties as when not pregnant.

All of the above testimony was undisputed.

REASONS FOR GRANTING THE WRIT

The petition for certiorari should be granted because the decision below is directly in conflict with a very recent decision of this Court and in conflict with two very recent decisions of other circuits, one of which is soon to be heard by this Court since certiorari has been granted. The question involved is an important Constitutional one which affects almost every school district in the United States.

1. *The decision below is in conflict with the decision of this Court in Reed v. Reed.*

After this case had been argued in the Sixth Circuit but before a decision had been rendered, this Court decided the landmark case of *Reed v. Reed*, 404 U.S. 71 (1971).

In *Reed* this Court struck down an Idaho statute which gave preference to men in Probate Court appointments. This Court held the statute was purely arbitrary and unreasonable. However, this Court adopted the standard of reasonableness as that by which statutory sex classification should be judged, for Fourteenth Amendment purposes. This Court said:

"A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike' " 404 U.S. 71, 76.

This Court did not adopt nor comment upon, although urged to do so by "Women's Liberation" groups, the standards by which discriminations based on race are judged for Fourteenth Amendment purposes, i.e., the "strict scrutiny" test which cancels the normal presumption of constitutionality, removes the burden of proof from the plaintiff challenging the regulation and places a heavy burden on the governing body which is attempting to justify the differential treatment. "*Sex Discrimination and Equal Protection: Do we need a Constitutional Amendment*" 84 Harv. L. Rev. 1499, 1502-1516 (1971) *Brown, et al.*, "*The Equal Rights Amendment: A Constitutional Basis for Equal Rights For Women*," 80 Yale L.J. 871.

Reed had been anticipated by *Dandridge v. Williams*, 397 U.S. 471 (1970), where this Court clearly called a halt to further extension of the strict scrutiny rule into state regulation of social and economic matters. Indeed, the majority opinion in *Dandridge* relies on *Goesaert v. Cleary*, 335 U.S. 464 (1948), which upheld a sex-based classification prohibiting female bartenders, 397 U.S. at 485.

While the opinion below in the case at bar pays lip service to *Reed* by quoting a passage from it (not the passage quoted above which establishes the rule of reasonableness), it ignores the rule of *Reed* and holds the maternity leave rule void for "overbreadth". The majority opinion quotes a short excerpt from the medical testimony and reaches the unjustified and incorrect conclusion that the medical evidence "under no construction of this record" supports the maternity leave rule. Fortunately, the dissenting opinion of Chief Judge Phillips contains a more accurate summary of the medical evidence on the complications, disorders and discomforts of pregnancy. What the Sixth Circuit majority has done is to adopt the strict scrutiny rule for a sex discrimination case and ignore the mandate of this Court in *Reed*.

2. *The decision below is in conflict with Struck v. Secretary of Defense, a Ninth Circuit decision presently under Review in this Court.*

This Court has recently, on October 24, 1972, granted *certiorari* in the Ninth Circuit case of *Struck v. Secretary of Defense*, case number 72-178, on the docket of this Court, 41 Law Week 3220. The Ninth Circuit had upheld an Army Air Force regulation that required resignation from service for a pregnant female officer.

The majority in the Court below attempted to distinguish the *Struck* case as being one which dealt with "pregnancy of a female officer in a war zone", thus implying that a female officer in a war zone somehow did not have the same Equal Protection rights that a pregnant school teacher had. If *Struck* was correctly decided by the Ninth Circuit, and this Court is about to inquire into that, then the decision of the majority below in the case at bar is in conflict with it.

3. *The decision below is in conflict with Schattman v. Texas Employment Commission, a decision of the Fifth Circuit.*

In *Schattman v. Texas Employment Commission*, 459 F. 2d. 32 (March, 1972) the Fifth Circuit upheld a mandatory maternity leave rule. The Fifth Circuit reviewed the medical testimony before it which was very similar to the medical testimony in the case at bar. It then applied the rule of reasonableness of *Reed v. Reed* and concluded that the regulation was valid.

The Sixth Circuit majority attempted to distinguish *Schattman* on the ground that the mandatory maternity leave rule in that case was not as onerous as that of Cleveland since it applied only at the seventh instead of the fifth month of pregnancy. The majority opinion is in error. The *Schattman* opinion covered not only terminations at

the end of the seventh month of pregnancy, but also terminations at the end of the fifth, thus making it practically identical with the Cleveland rule. At p. 40 of *Schattman* appears this statement:

"The record further shows that one Texas agency terminates its women employees at the end of the fifth month of pregnancy and others at the end of six months. Still others terminate at the end of the seventh month."

Furthermore, the Cleveland rule is not as onerous as the *Schattman* rule because Cleveland provides for automatic reinstatement at the end of the maternity leave while *Schattman's* rule does not. The *Schattman* court found no Constitutional infringement in these varying times for application of the rule nor should it. The true criterion is whether the evidence establishes that the rule is reasonable and bears a fair and substantial relation to the object of the legislation.

The dissent in the Sixth Circuit in the case at bar states it thus:

"In my view it is not the prerogative of this Court to determine whether a better regulation could be promulgated or whether a shorter period of time than the end of four months of pregnancy should be proscribed. We do not sit as a super Board of Education. Our concern is whether the regulation creates an arbitrary or unreasonable classification wholly unrelated to the objectives sought to be advanced by the Board of Education in adopting it. In my opinion we should not strike down the regulation because it 'may be unwise, improvident, or out of harmony with a particular school of thought,' See *Dandridge v. Williams*, 397 U.S. 471, 484."

4. This Court should squarely decide the important question of Federal Law involved in this case.

The important question of Federal Law involved in this case is whether statutory differentials based on sex are to be judged, for Fourteenth Amendment purposes, by the standard of reasonableness. *Reed* applied that standard but did not, in so many words, expressly reject the "strict scrutiny" standard applied in race discrimination cases. The Court below, as the dissent points out, limited or misread *Reed*. The question is an important one. Already the Fourth Circuit has adopted the language of the Court below in deciding a similar case, *Cohen v. Chesterfield County School Board*, _____ F. 2d. _____, Sept. 14, 1972, case No. 71-1707, motion for rehearing and suggestion for rehearing *en banc* pending, opinion below, 326 F. Supp. 1159 (E.D. Va. 1971). Chief Judge Blumenfeld of the District of Connecticut has rejected the District Court opinion in *Cohen* and expressly adopted that of Judge Connell, the District Judge in this case, *Green v. Waterford Board of Education*, 5 Emp. Pr. Dec. para. 7979, as has the Pennsylvania Commonwealth Court, *Cerra v. School District*, 4 Fair Emp. Pr. Cases 79 (1972). Lastly, the question is important in the light of the Equal Employment Opportunity Act of 1972, P.L. 92-261, which, as amended, now applies to public school employment, Sections 701 and 702 of P.L. 92-261. *One week* after the passage of this 1972 act the Equal Employment Opportunity Commission issued new rules containing "guidelines" on mandatory maternity leaves. 37 Fed. Reg. 6837. These guidelines make it a *prima facie* violation of Title VII for an employer to exclude employees "from employment . . . because of pregnancy . . ." 29 Code of Fed. Reg. 1604.10(b). These guidelines do not have the force of Federal Law, although probably entitled to "great deference", *Griggs v. Duke Power Co.*, 401 U.S. 424.

Surely it is important for this Court to examine, at this time, in the light of conflicting judicial decisions and administrative fiat, whether the rule of reasonableness is

to be applied to statutory sex classifications in all situations.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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A-1

APPENDIX

OPINION AND ORDER OF DISTRICT COURT.

Nos. C 71-292, C 71-333

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JO CAROL LA FLEUR
Plaintiff

v.

CLEVELAND BOARD OF EDUCATION et al.
Defendants

ANN ELIZABETH NELSON
Plaintiff

v.

CLEVELAND BOARD OF EDUCATION et al.
Defendants

MEMORANDUM OPINION AND ORDER

CONNELL, *District Judge*

This case has been presented to this Court asking for injunction against the defendant, Cleveland Board of Education, from enforcing a regulation of the Cleveland School Board prohibiting teachers who become pregnant from teaching their classes past the fourth month of pregnancy.

The plaintiffs in the case, Jo Carol La Fleur and Ann Elizabeth Nelson are teachers in the Cleveland public school system. Both teachers are married and pregnant; Mrs. La Fleur is expecting birth of her child sometime from the mid to the end of July of this year, while Mrs. Nelson expects her child on August 26, 1971.

Mrs. Jo Carol La Fleur, C 71-292, is a teacher at Patrick Henry Junior High School and has taught her class from September 1970 until March 12, 1971, when, due to the enforcement of the school board regulation, she was asked to discontinue her duties due to her pregnancy. The plaintiff, La Fleur, taught a seventh grade class composed exclusively of girls who are designated as under-achievers or problem children. This class is called a "project transition" class which is supervised and operated by the Cleveland public schools and partially funded with Federal money. This class is composed exclusively of girls, about twenty-five in number, who are to be given special attention for purposes of making them ready for the eighth grade in school. Mrs. La Fleur did not request the maternity leave, rather the regulation was enforced as to this plaintiff and her maternity leave was involuntary. Presently, in her absence, the class is being taught by a substitute teacher.

The plaintiff, Ann Elizabeth Nelson, C71-333, is a French teacher at Central Junior High School. She has taught French to seventh, eighth and ninth grade students since September 1970. Mrs. Nelson reported her pregnancy to her principal on January 29, 1971, and applied for maternity leave.

This case came on for hearing on April 19, 1971. The issues being identical in nature, the cases were tried and submitted together and both will be decided in this memorandum and order.

The regulation in question concerns maternity leaves of absence for teachers and is stated on pages 20-21 of the teachers handbook, Joint Ex. 1. The regulation provides that:

"Any married teacher who becomes pregnant and who desires to return to the employ of the Board at a future date may be granted a maternity leave of absence without pay."

The application of this regulation provides that the absence shall be effective not less than five months before the expected date of the normal birth of the child. Further, the regulation states that in application; this leave of absence shall be effective not less than five months before the expected date of the normal birth of the child, and application for such leave to the superintendent at least two weeks before the effective date of the leave of absence.

[1] The plaintiffs contend that this regulation discriminates against the plaintiffs as female employees with respect to their employment and deprives them of their "rights, privileges and immunities secured by the Constitution and laws of the Civil Rights Act of 1871, (42 U.S.C. § 1983)." Plaintiffs pray this court grant a declaratory Judgment ruling that the policies and practices of the school board are unlawful, and further the plaintiffs request the granting of a preliminary and permanent injunction enjoining the Cleveland Board of Education from discriminating against the plaintiffs on the "basis of sex with respect to the terms and conditions and privileges of her employment and compensation thereof in deprivation of her rights, privileges and immunities secured by the United States Constitution and laws and the Civil Rights Act of 1871."

The defendants maintain that the regulation is a "valid exercise of the school board's statutory authority to

make rules and regulations for its government and the government of its employees and the pupils of the school, pursuant to Ohio Revised Code Section 3313.20." The defendants further contend that "the maternity leave policy violates no constitutional rights of the plaintiff and is not discriminatory in any sense, let alone a per se discrimination based wholly on sex."

This Court reads the complaint as being brought pursuant to 42 U.S.C. § 1983 for an alleged violation of the plaintiffs' guarantee of equal protection under the Fourteenth Amendment to the United States Constitution. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1343; giving the district court original jurisdiction to hear cases for redress of deprivations arising under color of State law for alleged violations of privileges or immunities secured by the Constitution of the United States or by any act of Congress providing for the equal rights of citizens.

It is necessary to point out that the plaintiffs have not brought this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

The facts show that the maternity regulation in question was adopted in the early fifties upon the request of Dr. Mark C. Schinnerer, Superintendent of the Cleveland public schools. Prior to this time no maternity leave regulation had been in effect. The rule as it appears today is essentially the same as it was when adopted. The change in the rule now permits the mother to return at the beginning of the semester following the age of three months of the new child rather than the six months as previously provided. Also, the regulation now asks for one month's notice of pregnancy leave prior to the termination of employment rather than two weeks' notice as stated in the regulations as it now appears.

The evidence shows that prior to the rule, the teachers suffered many indignities as a result of pregnancy which consisted of children pointing, giggling, laughing and making snide remarks causing interruption and interference with the classroom program of study. The evidence shows that there were numerous reports of similar incidents which brought about the need for the Board of Education to prevent the continuance of this disruptive situation.

The evidence further shows that there were many instances where teachers refused to voluntarily withdraw from teaching until the birth of the child; and although no child was born in the classroom, a few times it was very close. The evidence shows that in one instance where a teacher's pregnancy was advanced, children in a Cleveland junior high school class were "taking bets on whether the baby would be born in the classroom or in the hall." Dr. Schinnerer testified that the purpose of this rule was to protect the teacher and maintain the continuity of the classroom program; the prevention of disruption in the educational process. When the regulation was presented to the Board of Education for adoption, at a public meeting, the vote of the Board of Education was unanimous.

The Cleveland Board of Education is concerned with the well-being of over 5800 teachers, of which 3774 are women. It is further pointed out that fifty percent of these women are of childbearing age, and that an average of 225 teachers are on maternity leave at all times.

A plaintiffs' witness testified that the incidence of violence in the Cleveland schools had increased steadily over the last ten years. The concurring evidence of Mr. Julius Tanczos, Supervisor of Secondary Organization of the Cleveland public schools shows that there were 256

assaults upon teachers by pupils and others, within the school buildings in the 1969-70 school year. The record shows that up to the date of the lawsuit, 140 such assaults had already taken place. The school system classifies an assault as the physical contact with the person or the threatening of a teacher with a weapon. This year alone, there has been the confiscation of 46 guns and 18 knives in the Cleveland public schools. Further it is shown that there were 136 teachers accidentally injured as the result of falls in corridors and hallways during the 1969-70 school year.

The duties of a teacher in the Cleveland public schools require her to be on her feet much of the day, and aside from teaching, they include the maintenance of order in the classrooms and the supervision of the movement of students in the halls, corridors and sometimes in the cafeterias. In addition to the teachers, the public school system employs 132 security guards which are stationed in the secondary schools, grades seven thru twelve, for the specific purpose of maintaining order and keeping outsiders from entering the school building.

With respect to the health of a pregnant teacher, during a normal pregnancy, the woman should gain between fifteen and twenty pounds. Pregnancy is a normal condition; and these individuals may continue to lead normal lives, however, the evidence shows complications can arise and the resulting effects can be very serious.

The evidence shows that toxemia occurs in as high as ten percent of pregnancies. This condition can occur slowly and may be unforeseen and will prohibit the individual from working until the condition is brought under control. The more serious complication of placenta previa occurs in one percent of the pregnancies and this condition is very serious and its gravity greatly increases should it occur after the sixth month. This condition can be

brought about by a sudden or violent physical exertion and can result in the woman's death; immediate hospitalization is required.

It is further shown that the frequency of urination increases during the last three months of pregnancy, the woman's agility is impaired, and strenuous, sudden, physical exertion is forbidden.

The evidence shows that the primary purpose for the initiation of this rule was to protect the continuity of the classroom program. The school board maintains this rule in an attempt to bring the disruption of the classroom program to a minimum. They further maintain that use of the one month advance notice requirement gives the school board the most accurate indication as to when the teacher will discontinue her duties and the new instructor will assume the responsibility of the study program. The purpose is also to allow the new teacher to become familiar with the classroom program and the students under the guidance of the original teacher who is about to depart. Furthermore, the purpose is to give the school board notice so that the original teacher's unexpected and sudden leave will not occur, and thus guaranteeing classroom continuity and providing the best possible safeguard against the disruption of the students' education. The intended purpose of the section in the regulation which permits the teacher to return at the beginning of the regular school semester following the child's age of three months is designed to protect the health of the mother and the child and assure continuity of the classroom program.

The Cleveland Board of Education is authorized to initiate such rules and regulations pertaining to employees and pupils as are necessary for the operation of its government. See Ohio Revised Code § 3313.20. The regulation in question had been made pursuant to this state statute

and from this state action the Fourteenth Amendment question comes before this Court.

In *Morey v. Doud*, 354 U.S. 457, 463-464, 77 S.Ct. 1344, 1349, 1 L.Ed.2d 1458 (1954) the Court summarized the rules for testing discrimination under the Fourteenth Amendment and states as follows:

"The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon a reasonable base, but is essentially arbitrary. *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61, 78-79, [31 S.Ct. 337, 55 L.Ed. 369] (1911).

In speaking of the "Equal Protection" clause of the Fourteenth Amendment, the Court in *McGowan v. Maryland*, 366 U.S. 420, 425, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1960) stated:

"the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their law results in some in-

equality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

In *Williams v. McNair*, D.C., 316 F. Supp. 134, 136 (1970) a three judge panel in deciding whether men have the right to gain admission to an all girl's college said:

"The Equal Protection Clause of the Fourteenth Amendment does not require identity of treatment for all citizens, or preclude a state, by legislation, from making classifications and creating differences in the rights of different groups. It is only when the discriminatory treatment and varying standards, as created by the legislative or administrative classification are arbitrary and wanting in any rational justification that they offend the Equal Protection Clause." (Citations omitted.)

Limitations placed upon women have been held as non-discriminatory. In *Muller v. Oregon*, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551 (1908) the Court in deciding upon a work hour limitation statute pertaining to women took into consideration the differences in the sexes and said:

"The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon her."

The Court in *Seidenberg v. McSorleys' Old Ale House, Inc.*, D.C., 317 F.Supp. 593 (1970), found no justification for a rule which excluded women as potential customers in an ale house while giving preference to men.

This court finds that the enormous task of providing an education for thousands of young students, and the regulations enacted in the furtherance of this purpose has no relevance to a regulation enacted by an ale house prohibiting the sale of alcoholic beverages to women and will be given no weight by this Court.

The plaintiffs cite *Schattmann v. Texas Employment Commission*, 3 CCH para. 8146, p. 6459 (W.D.Tex.1971) in which jurisdiction for relief is based upon Title VII of the Civil Rights Act of 1964, § 2000e et seq. of Title 42 U.S.C., as earlier pointed out, this is not the basis of jurisdiction in the instant case and the resulting difference in the applicable test is afforded little consideration. Furthermore, *Schattmann* did not involve a situation in which the education of children presented a most important issue. In *Schattmann*, supra, p. 6460, the stipulation that the plaintiff "was a permanent desk worker whose job entailed no significant physical exertion or personal contact with the public" could not be further from the necessary demands of a junior high school teacher responsible for the education of students in the Cleveland schools.

[2] The plaintiffs maintain that the traditional "reasonable basis test", *Lindsley*, supra, is not applicable in this case. Their contentions being that *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969), requires that for this Court to uphold the regulation in question the states meet the burden of showing a compelling state interest. In *Shapiro*, what was in question was the plaintiff's right to travel in interstate commerce and its resulting qualification for public assistance. In this instance the Court stated on page 638, 89 S.Ct. on page 1333:

"Since the classification here touches on the fundamental right of interstate movement, its constitution-

ality must be judged by the stricter standard of whether it promotes a compelling state interest."

The *Shapiro* case requires a stricter standard in judging cases involving fundamental rights. However, allegations alone are not the criteria for automatic application of this standard.

[3] The plaintiffs, citing *Shapiro*, presume their contentions are of fundamental concern preempting the considerations of the school board and giving rise to the application of this stricter standard. The primary duty of the school board is to educate students, and if necessary, regulations may be enacted in the furtherance of this function. Education is the right of a child, and the school board is before this Court protecting these rights which involved the thousands of students within its jurisdiction.

Speaking of this right, the Supreme Court stated in *Brown, et al. v. Board of Education of Topeka, et al.*, 347 U.S. 483, 493, 74 S.Ct. 686, 691, 98 L.Ed. 873 (1954) that:

"Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

[4] The rights in this case weigh most heavily with the students, and this Court holds that those assaulting this most serious concern of the school board must meet the traditional equal-protection test of showing that the regulation is without a reasonable basis.

The Cleveland public schools had operated prior to the early 1950's without this maternity leave rule, and the experiences were such that the Board was compelled to adopt a regulation to remedy this impediment to its educational function.

This requirement of maternity leave gives the school the best assurances that sudden disruption of the stu-

dents' classroom program due to an unforeseen complication in the teacher's condition will be minimized. The requirement of advance notice of termination also allows time for a substitute teacher to work and train with the intended class prior to assuming her full responsibilities, further maintaining continuity in the classroom program. The provision for resumption of employment after the child's birth serves the purposes of maintaining classroom continuity and protecting the health of the mother and child.

This regulation has minimized the classroom distractions and disruptions which had occurred prior to its adoption, further attesting to its necessity and reasonableness, and this court so finds.

The problem of the teacher's health and safety, before and after the child's birth, is of itself a valid concern of the school board aside from its interest in the students' education.

In an environment where the possibility of violence and accident exists, pregnancy greatly magnifies the probability of serious injury.

This court finds that for the reasons stated herein, the regulation in question is entirely reasonable, and most adequately meets the prescribed tests.

This court finds that the Cleveland Board of Education has not discriminated as to women whose condition is attendant to their sex.

This court finds that there is a reasonable basis for the rule which distinguishes pregnant teachers from all other teachers.

This court finds that no showing of a violation of the plaintiffs' constitutional rights has been made.

A-13

This court finds that the regulation furthers the design for quality education, and serves the important interests of the students in implementing this fundamental right.

This court finds that the plaintiffs' burden of showing that the maternity leave of absence is arbitrary and unreasonable has not been sustained.

In accordance, the maternity regulation of the Cleveland Board of Education is sustained in its entirety.

This constitutes the findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

It is so ordered.

OPINION OF THE COURT OF APPEALS

No. 71-1598

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JO CAROL LA FLEUR AND ANN ELIZ-
ABETH NELSON,

Plaintiffs-Appellants,

v.

CLEVELAND BOARD OF EDUCATION,
ET AL.,

Defendants-Appellees.

APPEAL from the
United States Dis-
trict Court for the
Northern District
of Ohio, Eastern
Division.

Decided and Filed July 27, 1972.

Before: CLARK, Associate Justice,* PHILLIPS, Chief
Judge, and EDWARDS, Circuit Judge.

EDWARDS, Circuit Judge. This is a complaint alleging violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. It is brought on behalf of two pregnant school teachers in the Cleveland school system under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970). Each has been placed on "maternity leave" involuntarily and seeks reinstatement with back pay and injunctive relief against the implementation of the school board's maternity leave policy. Each claims that the school board's rule is an unconstitutional discrimination on grounds of sex.

The rule appellants attack has the effect of requiring a pregnant teacher to take unpaid leave of absence from

* Honorable Tom C. Clark, Associate Justice of the Supreme Court of the United States, Retired, sitting by designation.

her school duties five months before the expected birth of a child and to continue on such status thereafter until the beginning of the first school term following the date when the baby becomes three months old.

The school board rule under attack provides as follows:

"Any married teacher who becomes pregnant and who desires to return to the employ of the Board at a future date may be granted a maternity leave of absence without pay.

"APPLICATION A maternity leave of absence shall be effective not less than *five (5) months before the expected date* of the normal birth of the child. Application for such leave shall be forwarded to the Superintendent at least *two (2) weeks before the effective date of the leave of absence*. A leave of absence without pay shall be granted by the Superintendent for a period not to exceed *two (2) years*.

"REASSIGNMENT A teacher may return to service from maternity leaves not earlier than the *beginning of the regular school semester* which follows the child's age of *three (3) months*. In unusual circumstances, exceptions to this requirement may be made by the Superintendent with the approval of the Board. *Written request for return to service from maternity leave must reach the Superintendent at least six (6) weeks prior to the beginning of the semester when the teacher expects to resume teaching and shall be accompanied by a doctor's certificate stating the health and physical condition of the teacher.* The Superintendent may require an additional physical examination.

"When a teacher qualifies to return from maternity leave, she shall have priority in reassignment to a vacancy for which she is qualified under her certificate, but she shall not have prior claim to the exact position she held before the leave of absence became effective.

"A teacher's failure to follow the above rules for maternity leave of absence shall be construed as termination of contract or as grounds for dismissal." (emphasis in original)

The District Judge who heard this case took extensive testimony, made findings of fact and concluded that the Cleveland Board of Education's rule did not discriminate against women and was not so unreasonable or arbitrary as to be unconstitutional. The basic rationale for the District Judge's holding is set forth as follows:

"The evidence shows that the primary purpose for the initiation of this rule was to protect the continuity of the classroom program. The school board maintains this rule in an attempt to bring the disruption of the classroom program to a minimum. They further maintain that use of the one month advance notice requirement gives the school board the most accurate indication as to when the teacher will discontinue her duties and the new instructor will assume the responsibility of the study program. The purpose is also to allow the new teacher to become familiar with the classroom program and the students under the guidance of the original teacher who is about to depart. Furthermore, the purpose is to give the school board notice so that the original teacher's unexpected and sudden leave will not occur, and thus guaranteeing classroom continuity and providing the best possible safeguard against the disruption of the students' education. The intended purpose of the section in the regulation which permits the teacher to return at the beginning of the regular school semester following the child's age of three months is designed to protect the health of the mother and the child and assure continuity of the classroom program." *La Fleur v. Cleveland Board of Education*, 326 F. Supp. 1208, 1211 (N.D. Ohio 1971).

Appellants' contentions are that the rule is arbitrary and unreasonable in its overbreadth and that it is a discriminatory rule applicable to only one sex, in violation

of the equal protection clause of the Fourteenth Amendment.

It is relevant for us to note two developments which have occurred since this case was argued. First, in a split decision a panel of the Fifth Circuit held a distinctly less onerous maternity leave rule of the Texas Employment Commission not to be arbitrary and unreasonable in a constitutional sense. *Schattman v. Texas Employment Commission*, — F.2d — (5th Cir. 1972). (Decided March 1, 1972, order amending Judge Wisdom's Opinion dated March 17, 1972.)

Second, Congress has now amended Title VII of the Equal Employment Opportunity Act to make it applicable to public schools. 42 U.S.C. § 2000e(a), P.L. 92-261, 86 Stat. 103 (1972). The EEOC has also adopted a rule prohibiting special maternity leave disability rules as discriminatory on grounds of sex. 29 C.F.R. § 1604.10(b), 37 Fed. Reg. 6837 (April 5, 1972).

While clearly neither of these last decisions controls our present case, they do tend to lessen the reach of our holding.

The Cleveland Board of Education maternity leave rule was adopted in 1952. It is considerably more severe in its effect upon employment of pregnant teachers than the Texas Employment Commission rule dealt with in the *Schattman* case, or any other similar rule which has been called to our attention. Depending on the period of the year when the birth of the child was expected, the effect of the rule would be to put any pregnant teacher on involuntary leave for a period ranging from six months to over a year. The Texas Employment Commission rule required leave to be taken two months before expected birth and an application to return to work could be filed at any time thereafter.

The principal social purpose claimed to be served by the Cleveland Board of Education rule is continuity of classroom instruction and relief of burdensome administrative problems. Yet any actual disability imposed on any teacher, male or female, poses the same administrative problems and many (including flu and the common cold) can't be anticipated or planned for at all. This rule may arguably make some administrative burdens lighter. But these are not the only values concerned. The Supreme Court reminds us:

"The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

"Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand." *Stanley v. Illinois*, — U.S. — (1972) (decided April 3, 1972) (Slip Opinion at 11-12). (Footnotes omitted.)

The three month enforced unemployment after birth has no relation to the employer's interest at all. While having a mother with her infant for a period after birth may arguably be a question of general state concern, Ohio has not thus far expressed it in any general and nondiscriminatory statute.

Appellees also urge consideration of a view expressed by the author of this rule when in 1952 he suggested its adoption. Dr. Schinnerer testified that he thought that absent the rule, pregnant teachers would be subjected to "pointing, giggling and . . . snide remarks" by the students. Basic rights such as those involved in the employment relationship and other citizenship responsibilities cannot be made to yield to embarrassment. See *Abbott v. Mines*, 411 F.2d 353 (6th Cir. 1969). Additionally, at the present time pregnant students are allowed to continue in the Cleveland schools without any apparent ill effects upon the educational system.

If there is substantial support for the Cleveland Board of Education rule to be found in this record, it must be in the testimony of the Board's witness Dr. William C. Wier, who discussed the problems of pregnancy with obvious concern. But Dr. Wier also testified that "each pregnancy is an individual matter." And his cross-examination concluded as follows:

"Q How would you advise a working woman who is pregnant as to her continued employment?

A I would first inquire what type of employment she was on — doing. If it involved physical activities, and in excess of what I would consider normal or potentially in excess, I would advise her probably that she should stop working at an earlier time than somebody who was sitting entirely at a desk job.

.. .
A (Continuing) What I was going to say is that I have had patients that worked as secretaries throughout pregnancy, and I have seen nurses that worked in the hospital going to term and practically going from the nurse's station up to the delivery room.

Now, usually the hospitals — in this situation, would put these nurses in the type of job on the hospital floor in which their physical activities were considerably reduced, and not require them to do as much; but in general I have never said to a patient, 'You can't do this or that.' I can only advise them.

Q Doctor, have you treated patients who have worked through or worked beyond the end of the fourth month of their pregnancy?

A Of course I have — many.

Q Have you always disapproved of this?

A No.

Q Have you told the women to stop working?

A I have on occasion suggested it would be a wiser thing if they discontinued work.

Q But not always?

A Oh, no."

Under no construction of this record can we conclude that the medical evidence presented supports the extended periods of mandatory maternity leave required by the rule both before and after birth of the child.

In a case decided after the District Court decision in this case, the United States Supreme Court invalidated a statute of the State of Idaho which specifically preferred male relatives over female relatives as administrators of estates. The Court's opinion commented:

"Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether § 15-314 advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elim-

ination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex. *Reed v. Reed*, 404 U.S. 71, 76-77 (1971).

Here, too, we deal with a rule which is inherently based upon a classification by sex. Male teachers are not subject to pregnancy, but they are subject to many types of illnesses and disabilities. This record indicates clearly that pregnant women teachers have been singled out for unconstitutionally unequal restrictions upon their employment. Additionally, as we have observed, the rule is clearly arbitrary and unreasonable in its overbreadth. As the Supreme Court said in *Wieman v. Updegraff*, 344, U.S. 183 (1952):

"We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Id.* at 192.

We believe that the Fifth Circuit's decision in *Schattman v. Texas Employment Commission*, *supra*, is easily distinguishable on the facts and that the same is true in relation to *Struck v. Secretary of Defense*, — F.2d — (9th Cir. 1971), which dealt with pregnancy of a female officer in a war zone. On the other hand, there is a marked trend of cases to invalidate regulations based on sex classifications unless supported by a valid state interest. *Reed v. Reed*, *supra*; *Sailor Inn v. Kirby*, 95 Cal. Rptr. 329, 485 P.2d 529 (1971); *Cohen v. Chesterfield County School Board*, 326 F. Supp. 1159 (E. D. Va. 1971); *Seidenberg v. McSorley's Old Ale House, Inc.*, 317 F. Supp. 593 (S.D. N.Y. 1970); *Kirstein v. Rector of University of Virginia*,

309 F. Supp. 184 (E. D. Va. 1970); *Heath v. Westerville Board of Education, et al.* — F. Supp. — Civil #71-379, S.D. Ohio June 29, 1972.

We do not, of course, by our holding concerning this rule deal with reasonable employer requirements of notice of impending disability or of health examinations or certificates. Such issues are not presented by this appeal.

The judgment of the District Court is vacated and reversed and the case is remanded for further proceedings consistent with this opinion.

PHILLIPS, Chief Judge. (Dissenting in part, concurring in part.) I respectfully dissent from the part of the majority opinion which strikes down the regulation pertaining to maternity leave prior to delivery.

It is my opinion that the pre-delivery part of the rule of the Cleveland Board of Education under attack on this appeal is a permissible and reasonable exercise of the discretion vested in the Board in the administration of the school system. I see no violation of the rights of teachers under the Equal Protection Clause presented by the facts and circumstances of this case.

"Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . .

By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (footnote omitted).

The capabilities of its teachers and the maintenance of sound educational environment are matters of legitimate concern to the Board of Education. The evidence presented to the District Court shows that about 225 out

of the more than 5800 teachers employed by the Board in the Cleveland school system are on maternity leave at any given time and that approximately 1900 teachers are women of child bearing age. Expert testimony established that every pregnancy impairs to some degree the ability to teach and supervise children. Pregnancy limits the capacity of the teacher to engage in normal physical activity. Mobility is reduced. A pregnant teacher is subjected to an increased risk of unexpected incapacitation. Such impairment and risk increase during the later months of pregnancy. There is no question that the medical condition of a pregnant teacher will require that she discontinue teaching at some point during the course of the pregnancy.

Appellants urge that the determination of this point of time should be made on an individual basis, relying on the thirty day notice requirement as ample to meet the objectives of the Board. The record in this case convinces me that there is no assurance that an individualized decision in all cases can be made thirty days prior to the time that medical necessity may require a teacher to discontinue her classroom duties. To impose upon the school system the obligation of examining each teacher individually throughout the course of her pregnancy to insure that she is capable of carrying out the manifold and demanding duties of her profession would constitute a burden more onerous than mere administrative inconvenience.

In my view it is not the prerogative of this court to determine whether a better regulation could be promulgated or whether a shorter period of time than the end of four months of pregnancy should be prescribed. We do not sit as a super Board of Education. Our concern is whether the regulation creates an arbitrary or unreasonable classification wholly unrelated to the objectives sought to be advanced by the Board of Education in adopting it. In my

opinion, we should not strike down the regulation because it "may be unwise, improvident, or out of harmony with a particular school of thought." See *Dandridge v. Williams*, 397 U.S. 471, 484.

Nor do I agree that the regulation should be invalidated because it applies only to pregnancy and not to other conditions and diseases that incapacitate teachers, both male and female, from classroom duties. It is true that, during the course of a school year, a certain number of teachers will experience illness or accidents requiring leaves of absence. The wide range of these incapacitating conditions is such that the Board of Education has seen fit to deal with them on an individual basis. Pregnancy, on the other hand, is a condition of predictable duration and symptoms involving a substantial number of teachers every year. In my opinion a classification dealing with this problem is not so arbitrary or unreasonable as to violate the Equal Protection Clause.

It is not every classification that amounts to a denial of equal protection.

"The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. . . . [C]lassifications will be set aside only if no grounds can be conceived to justify them. With this much discretion, a legislature traditionally has been allowed to take reform one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind, and a legislature need not run the risk of losing an entire remedial scheme simply because it failed . . . to cover every evil that might conceivably have been attacked." *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 809 (1969) (citations omitted).

Upon the evidence presented in the District Court, Judge Connell found that the requirement of maternity leave prior to delivery gives the school system the best assurance that sudden disruption of the classroom program due to unforeseen complications in the condition of a teacher will be minimized. 326 F.Supp. at 1213. I agree with this conclusion. In my view it is not "clearly erroneous." Rule 52(a), Fed. R. Civ. P.

With respect to the three months post-delivery waiting period before resuming teaching, I agree with the majority opinion. No evidence was introduced in the District Court and no reasons offered to this court as to how this requirement is related rationally to any legitimate objective of the Board.

I would affirm in part and reverse in part.

**ORDER ON MOTION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC**

(Filed August 29, 1972)

No. 71-1598

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JO CAROL LA FLEUR AND ANN ELIZABETH NELSON,

Plaintiffs-Appellants,

v.

CLEVELAND BOARD OF EDUCATION, ET AL.,

Defendants-Appellees.

ORDER

Before: CLARK, Associate Justice,* PHILLIPS, Chief Judge, and EDWARDS, Circuit Judge.

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above-styled case, and no judge having moved for rehearing en banc, said petition for rehearing is hereby denied. Judge Phillips dissents.

Entered by order of the Court

JAMES A. HIGGINS

Clerk

* Honorable Tom C. Clark, Associate Justice of the Supreme Court of the United States, Retired, sitting by designation.

CERTIFICATE OF SERVICE

Three copies each of the Petition for a Writ of Certiorari and Appendix have been mailed this 25th day of

November, 1972, by depositing the same in a United States Mail Box, First Class, postage prepaid, addressed to Carol S. Agin, 3800 Lake Shore Drive, Apt. 5E, Chicago, Illinois, 60613, and Lewis R. Katz, 2145 Adelbert Road, Cleveland, Ohio 44106, attorneys for plaintiffs-appellants; Sidney Picker, Jr., 3079 Van Aken Boulevard, Shaker Heights, Ohio 44120, attorney for Women's Equity Action League; David Rubin, 1201 Sixteenth Street, N.W., Washington, D.C. 20036 and Jerry D. Anker, 1730 M. Street, N.W., Washington, D.C. 20036, attorneys for the National Education Association; Lucille Houston, 816 Engineers Building, Cleveland, Ohio 44114, attorney for the American Civil Liberties Union; Susan Deller Ross, 1800 G Street, N.W., Washington, D.C. 20506, attorney for the United States Equal Employment Opportunity Commission, and Jordan Rossen, 8000 East Jefferson Avenue, Detroit, Michigan 48214, attorney for International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), *amici curiae*.

CHARLES F. CLARKE
Attorney for Petitioners

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. **72-1129**

SUSAN COHEN, *Petitioner*

v.

CHESTERFIELD COUNTY SCHOOL BOARD
AND DR. ROBERT F. KELLY, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

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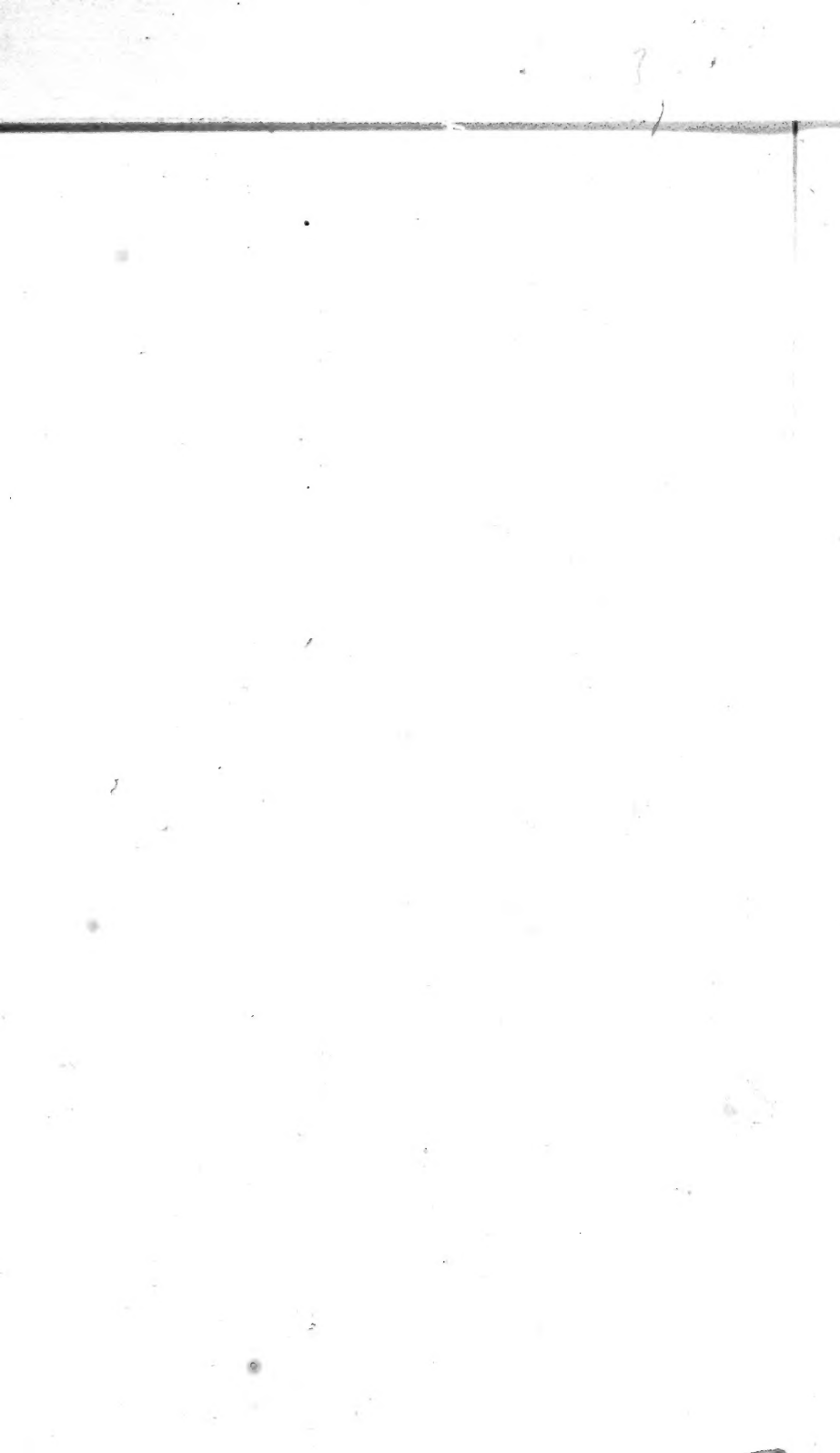


TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL PROVISION INVOLVED	2
QUESTIONS FOR REVIEW	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
I. A Policy Which Requires Female Employees To Resign After The Fifth Month of Pregnancy Constitutes an Arbitrary and Invidious Sex Classification in Violation of the Due Process and Equal Protection Clause of the Fourteenth Amendment	5
II. The United States Court of Appeals for the Fourth Circuit, <i>en banc</i> , Violated Petitioner's Constitutionally Guaranteed Rights to Due Proc- ess	13
CONCLUSION	15
APPENDIX:	
I. Opinion of the United States Court of Appeals for the Fourth Circuit	1a
II. Opinion of the United States Court of Appeals for the Fourth Circuit, <i>en banc</i>	14a
III. 29 C.F.R. 1604.10	28a

TABLE OF CITATIONS

CASES:

<i>Bravo v. Board of Education</i> , 345 F.Supp. 155 (N.D. Ill. 1972)	6, 7, 9, 12, 14
<i>Carrington v. Rash</i> , 380 U.S. 89 (1965)	8
<i>Cohen v. Chesterfield County School Board</i> , 326 F. Supp. 1159 (E.D. Va. 1972) aff'd — F.2d — (4th Cir. 1972) reversed — F.2d — (4th Cir. 1973) (<i>en banc</i>)	6, 7, 9, 10, 12

	Page
<i>Green v. Waterford Board of Education</i> , Docket No. 72-1676 (2nd Cir., decided Jan. 23, 1973) ..	6, 7, 8, 9, 12, 14
<i>Johnson v. Branch</i> , 364 F.2d 177 (4th Cir. 1966)	11
<i>LaFleur v. Cleveland Board of Education</i> , 326 F.Supp. 1208 (N.D. Ohio 1971) reversed 465 F.2d 1184 (6th Cir. 1972) <i>petition for cert. filed</i> 41 U.S.L.W. 3315 (U.S. Nov. 27, 1972 No. 27-777)	6, 7, 8, 11, 12, 14
<i>McGowan v. Maryland</i> , 366 U.S. 420 (1961)	10
<i>Monell v. Department of Social Services</i> , 4 EPD 5936 (S.D.N.Y. 1972)	12, 14
<i>Morey v. Doud</i> , 354 U.S. 457 (1957)	10
<i>Phillips v. Martin-Marietta Corp.</i> , 416 F.2d 1257 (5th Cir. 1969)	11
<i>Pocklington v. Duval County School Board</i> , 345 F.Supp. 163 (M.D.Fla. 1972)	6, 12, 14
<i>Police Department v. Mosley</i> , 408 U.S. 92 (1972)	12
<i>Reed v. Reed</i> , 404 U.S. 71 (1971)	8, 12
<i>Royster Guano Co. v. Virginia</i> , 253 U.S. 412 (1920) ..	12
<i>Schattman v. Texas Employment Commission</i> , 459 F.2d 32 (5th Cir. 1972) <i>cert. denied</i> , 41 U.S.L.W. 3372 (U.S. Jan. 8, 1973)	8, 11
<i>Shapiro v. Thompson</i> , 394 U.S. 618 (1969)	10
<i>Stanley v. Illinois</i> , 405 U.S. 645 (1972)	8
<i>Weber v. Aetna Casualty & Surety Co.</i> , 406 U.S. 164 (1972)	12
<i>Williams v. San Francisco Unified School District</i> , 340 F.Supp. 438 (N.D. Cal. 1972)	6, 7, 8, 9, 12, 14

CONSTITUTION, REGULATIONS, STATUTES, RULES

United States Constitution

Fourteenth Amendment	5, 10, 13
----------------------------	-----------

29 C.F.R. 1604.10	14
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Public Law 92-261, 92nd Cong., H.R. 1746 (Equal Employment Opportunity Act of 1972)	14
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Federal Rules of Appellate Procedure

Rule 35	13
Rule 40	13

IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No.

SUSAN COHEN, *Petitioner*

v.

CHESTERFIELD COUNTY SCHOOL BOARD
AND DR. ROBERT F. KELLY, *Respondents*.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT**

The petitioner, Susan Cohen, by her attorneys, Philip J. Hirschkop, David Ross Rosenfeld and John B. Mann, respectfully pray for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to reverse its decision *en banc* reversing the judgment of the United States District Court for the Eastern District of Virginia, Alexandria Division.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, sitting *en banc*, is still unreported but appears at page 14a of the Appendix. The opinion of the United States Court of Appeals

for the Fourth Circuit initially affirming the judgment of the United States District Court for the Eastern District of Virginia, Richmond Division, is still unreported but appears at page 1a of the Appendix. The decision of the United States District Court for the Eastern District of Virginia, Alexandria Division is reported at 326 F. Supp. 1159 (E.D.Va. 1971).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on September 14, 1972. On September 20, 1972 respondents filed their Petition for Rehearing and Suggestion for rehearing *en banc*, which Petition and Suggestion was accepted on January 2, 1973. The judgment of the United States Court of Appeals for the Fourth Circuit, *en banc*, was entered on January 15, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV, Sec. 1

"... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS FOR REVIEW

Does a policy which requires female teachers to resign after the fifth month of pregnancy constitute an arbitrary and invidious sex classification in violation of the due process and equal protection clauses of the Fourteenth Amendment?

Did the United States Court of Appeals for the Fourth Circuit commit error in granting respondents' Petition and Suggestion for Rehearing *en banc* and in rendering judgment without requesting or permitting petitioner the right to submit briefs and present argument on her behalf?

STATEMENT OF THE CASE

Petitioner, Susan Cohen, was employed by the School Board of Chesterfield County, Virginia, as a Senior Government teacher from September 1968 to December 1970, under standard employment contracts. On or about November 2, 1970, Mrs. Cohen informed the School Board that she was pregnant and her estimated due date was April 28, 1971.¹ She requested that she be given maternity leave effective April 1, 1971 and presented a letter from her gynecologist stating that she could continue working as long as she chose. Pursuant to the School Board's maternity leave regulations, Mrs. Cohen was informed by school authorities on November 6, 1970, that her request had been denied by the School Board and her employment would be terminated as of December 18, 1970.

On November 25, 1970, petitioner personally appeared before the School Board to request that she be allowed to teach until April 1, 1971, or at least until the end of the first semester on January 21, 1971. She presented a letter from her principal Mr. John R. Kopko recommending that she be allowed to teach until January 21, 1971. The basis of denial was that it was impossible to make a policy to suit everyone, and if the present policy is not adequate the school board would review it at the end of the school year.

¹ On May 2, 1971, Mrs. Cohen gave birth to a son.

Upon deposition, the five members of the School Board assigned varied reasons for the existence of a maternity leave policy incorporating a five month rule. Three members of the Board and the Superintendent believed that the rate of absenteeism of a teacher increases in the last four months of pregnancy. The Superintendent and three members felt that it would be dangerous for a pregnant woman to walk down school halls and climb steps. Three members of the School Board felt that it was not good for the students to see women whose pregnancy becomes conspicuous to others, including one member who stated, "because some of the kids say, my teacher swallowed a watermelon, things like that. That is not good for the school system."

At trial and for the very first time during this litigation Dr. Kelly, the Superintendent, suggested that the main reason for the maternity leave regulation is to foster "continuity of teaching" by giving the School Board advance notice to secure replacement teachers. He maintained that the students suffer when there is an interruption of the teaching process between the continuity of the teaching from one teacher to a substitute teacher. He admitted, however, that this argument occurred to him "primarily because of this litigation as distinguished from the reason for the policy." The District Court found as a matter of fact that "no tenable administrative reason [had] been advanced by the defendants in defense of the provision."

Expert medical testimony at trial showed that pregnancy does not incapacitate a school teacher after the fifth month and that there are no valid medical reasons to support these policies. Pregnant women have the same range of coordination as any other group of

people. A pregnant woman could react as well as a nonpregnant woman in an emergency situation. The threat of pushing in halls would present no special problems for pregnant women. Additionally Public Health studies demonstrate that women miss less time from work for delivery and possible disorders of pregnancy, than from such conditions as upper respiratory ailments and injuries.

REASON FOR GRANTING THE WRIT

The fundamental question in this case is the constitutionality of a policy requiring pregnant teachers to take maternity leave five months prior to the birth of the child. In deciding this question in the affirmative, the Court of Appeals for the Fourth Circuit stands alone in the face of overwhelming authority to the contrary. This arbitrary and discriminatory policy has worked a hardship on petitioner solely because of her geographic location. Action by this Court is necessary to bring the Fourth Circuit into conformity with other jurisdictions.

I. A POLICY WHICH REQUIRES FEMALE TEACHERS TO RESIGN AFTER THE FIFTH MONTH OF PREGNANCY CONSTITUTES AN ARBITRARY AND INVIDIOUS SEX CLASSIFICATION IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

In virtually every case testing the constitutionality of a policy requiring pregnant teachers to take maternity leave two to six months prior to delivery, school boards and administrators have sought to rationalize the policy on the grounds that it was reasonably related or necessary to a) protection of the health and safety of the expectant mother and fetus; b) administrative convenience; and c) assuring students con-

tinuity of education. Upon examination, however, it is clear that not one of these rationalizations is either legally or factually sound.

A. Protection of the Mother and Fetus.

In the case at bar, the District Court, after a full trial on the merits, held that "The unrefuted medical evidence is that there is no medical reason for the Board's regulation." *Cohen, supra*, 326 F.Supp. at 1160. Similar conclusions were reached in *Williams v. San Francisco Unified School District*, 340 F.Supp. 438, 443 (N.D.Cal. 1972) ("it is undisputed that the plaintiff is medically able to work efficiently until the date of her delivery . . ."); *Bravo v. Board of Education*, 345 F.Supp. 155, 157 (N.D.Ill. 1972); *LaFleur v. Cleveland Board of Education*, 465 F.2d 1184 (6th Cir. 1972) *petition for cert. filed*, 41 U.S.L.W. 3315 (U.S. Nov. 27, 1972) (No. 72-777), ("Under no construction of this record can we conclude that the medical evidence presented supports the extended periods of mandatory leave required. . ."); *Green v. Waterford Board of Education*, Docket No. 72-1676 (2nd Cir., decided Jan. 23, 1973) ("We see little rationality in a rule that purports for reasons of health alone to treat all pregnancies alike rather than on case by case basis."). See also *Pocklington v. Duval County School Board*, 345 F.Supp. 163 (M.D.Fla. 1972).

Not even the Fourth Circuit in the instant case suggests that a rational basis for the rule can be derived from this "health and safety" argument.

B. Administrative Convenience

In overruling the District Court, the Fourth Circuit, *en banc*, implied that "administrative convenience", on

the other hand, was an acceptable rationale for requiring pregnant teachers to take maternity leave.

Unlike most illnesses and other disabilities, too, pregnancy permits one to foresee its culmination . . . and to prepare for it.

. . . As planning precedes most pregnancies, planning for the arrangements they necessitate may go hand in hand with them.

That circumstance supplies the justification for the rule that puts the starting of maternity leave, after the fifth month of pregnancy, within the control of school officials rather than in that of each pregnant teacher (footnote omitted). Cohen, supra, Appx. 21a (emphasis added).

However, as the District Court found, and as Judge Winter, writing first for the majority, and then for the dissent, observed,

The record is literally devoid of any reason, medical or *administrative*, why a pregnant teacher must accept an enforced leave by the end of the fifth month of pregnancy if she and her doctor conclude that she can perform her duties beyond that date. *Cohen, supra, Appx. 6a; 25a-26a (emphasis added).*

This observation is identical to the one made by the Second Circuit: "Apart from the speculation of the District Court, however, there is nothing in the record to support this proposition." *Green, supra, at 1735.* See also *Bravo, supra*, and *LaFleur, supra*. See also *Williams, supra*, wherein the Court held:

"It is not sufficient to uphold a practice otherwise violative of the standards governing the equal protection clause to say that the alternative to the classification challenged would create a situation

which might require more work on the part of the administering agency." 340 F.Supp. at 445.

In this regard, this Court has consistently rejected theories of statutory interpretation or construction which permit "administrative convenience" to override consideration of individual abilities. *Carrington v. Rash*, 380 U.S. 89 (1965); *Stanley v. Illinois*, 405 U.S. 645, 656 (1972); *Reed v. Reed*, 404 U.S. 71 (1971). State as succinctly as possible,

While it might be easier for the Board to handle all maternity leave problems on an arbitrary, blanket basis, a reduced administrative work load is constitutionally insufficient to sustain this discriminatory treatment of pregnant women. *Green, supra* at 1735.

C. Continuity of Education

The "continuity of education" argument was first raised and accepted in *LaFleur v. Cleveland Board of Education*, 326 F.Supp. 1208 (N.D. Ohio 1971). On appeal, however, the Sixth Circuit distinguished on the facts the one Circuit Court decision upholding such a policy² and implicitly rejected the "continuity of education" argument, holding the mandatory leave policy "arbitrary and unreasonable".

In *Williams, supra*, the Court, again, distinguishing *Schattman, supra*, on the facts, observed that the most significant interruption to the "continuity of education" would result not from the absence, but rather, the enforcement of such a maternity leave policy.

"All school children under the aegis of the District are entitled to the greatest possible degree of con-

² *Schattman v. Texas Employment Commission*, 459 F.2d 32 (5th Cir. 1972), cert. denied, 41 U.S.L.W. 3372 (U.S. Jan. 8, 1973).

tinuity in their educational programs. This desideratum is indisputably frustrated when, for example, a female teacher, otherwise qualified and capable of performing her duties, is hoicked out of the classroom for at least a third of the effective teaching year because she has become pregnant. 340 F.Supp. at 446.

Similarly, in *Bravo, supra*, the evidence clearly demonstrated that "... the rigid timetable for maternity leaves now in effect actually contributes to discontinuity" 345 F.Supp. at 155. See also *Green, supra* at 1733.

The record in this case is absolutely devoid of evidence supporting the rationalization that the absence of a pregnant teacher either prior to or at the time of child birth, will in fact be "extended" (in fact, the evidence is quite to the contrary). The record is equally silent and unsupporting for the assertion that school children will necessarily be victimized by a "succession of substitutes." In fact, testimony at trial demonstrated that the primary concerns of members of the School Board and administration related to increased absenteeism, the ability of pregnant teachers to walk down halls and climb steps, the conspicuousness of the condition of pregnancy, and the fact that "some of the kids say, my teacher swallowed a watermelon. . . ." Nevertheless, the Fourth Circuit, *en banc*, concludes from these spurious and traditionally chauvinistic presumptions, that a mandatory policy of maternity leave "may reasonably be regarded as contributing to the better education of the pupils by enabling school officials to arrange a larger degree of conformity in their education." (footnote omitted). *Cohen, supra*, Appx. 22a.

The record shows that respondents' "continuity of education" argument was developed without a basis in fact and solely for the purpose of providing an *ex post facto* justification for the rule. Clearly it is far more logical to conclude, as did Judge Winter, dissenting, that "The continuity of the educational process would have been better preserved had Mrs. Cohen been permitted to complete the semester rather than to subject her students to a new teacher at an illogical and avoidable breaking point in the curriculum." *Cohen, supra*, Appx. 24a-25a.

D. Denial of Equal Protection

When a rule or regulation is attacked on the grounds that it violates the Equal Protection Clause of the Fourteenth Amendment, one of two tests or theories of analysis may be applied to resolve the question. Applying the first of these two tests, the rule is presumed constitutional and will not be disturbed unless it is determined to be without rational basis or based upon grounds wholly irrelevant to the achievement of some permissible state purpose. *Morey v. Doud*, 354 U.S. 457 (1957); *McGowan v. Maryland*, 366 U.S. 420 (1961). However, under the second approach, where the offending discriminatory regulation impinges upon fundamental constitutional or civil rights, the Court must ask not only whether the classification challenged is rationally related to a legitimate governmental objective, but, more importantly, whether the rule and classification is justified by some "compelling governmental interest." *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969).

A regulation designed to restrict the employment rights of pregnant teachers only be viewed as a regulation which restricts the employment rights of wom-

en as a sex and hence is one necessarily based solely upon sex. As stated by Judge Wisdom, dissenting in *Schattman v. Texas Employment Commission, supra*, "Female employees are the only employees . . . who become pregnant; it follows that they are provisionally dismissed from work on account of their sex" 459 F.2d at 42. Chief Judge Brown, dissenting in *Phillips v. Martin-Marietta Corporation*, 416 F.2d 1257, 1259 (5th Cir. 1969), a case in which an employee who was willing to hire men with pre-school age children for certain positions, but not women, held a similar view: "Nobody—and this includes Judges, Solominie or life tenured—has yet seen a male mother. A mother, to over simplify the simplest biology, must be a woman."

The view that any rule designed to discriminate against pregnant women was in fact a rule discriminatory on the basis of sex, was similarly adopted by the Sixth Circuit in *LaFleur, supra*, wherein the Court held that such a rule "is inherently based upon a classification by sex." 465 F.2d at —.

To hold, as did the Fourth Circuit, *en banc*, that a regulation discriminating against pregnant teachers "does not apply to women in an area in which they compete with men" and that it is not an "invidious discrimination" to require pregnant teachers to take leaves of absence according to some arbitrary schedule is to "pretend not to know as judges what we know as men." *Johnson v. Branch*, 364 F.2d 7, 182 (4th Cir. 1966). It is both unnecessary and obfuscating to transgress into the area of social morality and the logic of permitting the exposure of flat and hairy male chests while prohibiting bare breasts in the sunlight, as was done by Chief Judge Haynsworth, writing for the

majority in *Cohen* (see Appx. 18a). A regulation discriminating against the condition must necessarily discriminate against the only sex capable of experiencing that condition—women. Hence, the more stringent “compelling governmental interest” test should be applied. See *LaFleur, supra*; *Monell v. Department of Social Services*, 4 E.P.D. 5936 (S.D.N.Y. 1972)

Yet, even if the Court prefers to apply the “rational basis” test, the rule and its classification must nevertheless fail. As stated by this Court in *Reed v. Reed*, 404 U.S. 71, 76 (1971):

“A classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. . . .’ *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced. . . . See also *Weber v. Casualty and Surety Co.*, 406 U.S. 164 (1972); *Police Department v. Mosley*, 408 U.S. 92 (1972).

The evidence in the instant case, just as the evidence in *Williams, supra*; *Bravo, supra*; *LaFleur, supra*; *Green, supra*; *Pocklington, supra*; and *Monell, supra* completely fails to disclose any “fair and substantial relation” between the interest of the legislation and the classification. In each case, theories asserting the interest in the health and safety of the teacher or fetus, the interests of the students in “continuity of education”, the interests of the administration in “convenience”, have time and again been shown to be arbitrary, capricious, unrelated to or ineffective in achieving the object of the rule.

The mandatory leave policy for pregnant teachers was born out of prejudice and ignorance. In a very few instances it has been sustained as a matter of convenience. It must be viewed for what it truly is, an anachronism and nothing more.

II. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, EN BANC, VIOLATED PETITIONER'S CONSTITUTIONALLY GUARANTEED RIGHT TO DUE PROCESS.

Rule 35 of the Federal Rules of Appellate Procedure suggests that an *en banc* rehearing by a Court of Appeals will be ordered where it is (1) "necessary to secure or maintain uniformity in decisions, or (2) when the proceeding involves a question of exceptional importance." Since there were no contradictory decisions in this or any other circuit of the United States Court of Appeals, it must be concluded that the Court of Appeals granted rehearing *en banc* in this matter because there were questions of "exceptional importance" involved.

Under Rule 40 of the Federal Rules of Appellate Procedure, petitioner was precluded from filing an answer to the Petition for Rehearing without a specific request to do so by the Court of Appeals. However, Rule 40 further suggests that "a Petition for Rehearing would ordinarily not be granted in the absence of such a request."

The specific application of Rule 40 to the instant case is most significant in light of the sequence of events leading up to the Fourth Circuit Court of Appeals decision on January 2, 1973 to rehear the case *en banc*, and its Order of January 15, 1973 reversing its previous decision. The original appellant brief

was filed more than fourteen months prior to the January 2, 1973 Order granting rehearing *en banc*. Appellate oral argument took place on January 4, 1972, over a year prior to the Court of Appeals Order reversing the lower Court. Additionally, five of the seven judges sitting on the Fourth Circuit bench never had the benefit of any oral argument in this case. Every major federal decision covering the question of pregnant teachers' rights has been rendered within the past twelve months.³ Nevertheless, petitioner was not granted leave to file additional briefs or present oral argument in this case.

Considering the above circumstances, it is difficult, if not impossible to conceive of a series of procedures more devoid of due process. The Court of Appeals acted solely upon respondents Petition and Suggestion. Counsel for petitioner were not afforded the opportunity to respond. They were not allowed to incorporate recent decisions into the theory of their case or to distinguish contrary decisions. In this system of jurisprudence which extols the principles of advocacy, petitioner was denied the right to advocate.

In light of the obvious importance and far reaching effect of this case, the actions of the Court of Appeals can only be viewed as having effectively denied petitioner due process of law.

³ See *LaFleur, supra*; *Green, supra*; *Monell, supra*; *Pocklington, supra*; *Williams, supra*; *Bravo, supra*. See also Public Law 92-261, 92nd Cong., H.R. 1746 (Equal Employment Opportunity Act of 1972), which amendment extended the coverage of Title VII to employees of state and municipal governments. See Appendix 28a-29a.

CONCLUSION

For these reasons, a Writ of Certiorari should issue and the decision of the Fourth Circuit Court of Appeals should be summarily reversed.

Respectfully submitted,

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February 15, 1973

APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 71-1707

SUSAN COHEN, *Appellee*,

v.

CHESTERFIELD COUNTY SCHOOL BOARD AND
DR. ROBERT F. KELLY, *Appellants*,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Amicus Curiae.

Appeal from the United States District Court for the
Eastern District of Virginia, at Richmond.
Robert R. Merhige, Jr., District Judge.

(Argued January 4, 1972 Decided September 14, 1972)

Before HAYNSWORTH, Chief Judge, WINTER, Circuit Judge,
and YOUNG, District Judge.

Samuel W. Hixon, III, (Williams, Mullen, and Christian,
and Frederick T. Gray, Robert E. Eicher, Oliver D.
Rudy and Morris E. Mason on brief) for Appellants,
and Philip J. Hirschkop (John B. Mann on brief) for
Appellee. (John de J. Pemberton, Jr., Acting General
Counsel, Julia P. Cooper, Chief, Appellate Section,
Ed Katze, District Attorney, Washington District Of-
fice, on brief) for Equal Employment Opportunity
Commission.

WINTER, Circuit Judge:

Mrs. Susan Cohen, a school teacher, who, notwithstanding her own wishes and the medical advice of her doctor, was required to take a leave of absence at the end of the fifth month of her pregnancy in accordance with defendant's maternity leave regulation, attacked the validity of the regulation on equal protection grounds in a suit brought under 42 U.S.C.A. § 1983. The district court held that the regulation was within the proscription of the equal protection clause of the fourteenth amendment and granted appropriate relief. *Cohen v. Chesterfield County School Board*, 326 F.S. 1159 (E.D. Va. 1971). In this appeal by the school board, we affirm.

—I—

The facts are fully set forth in the opinion of the district court and few need be repeated. The text of the regulation is set forth in the margin.¹ Mrs. Cohen gave the prescribed written notice of her pregnancy on November

¹ The maternity leave regulations of the Chesterfield County School Board provide:

- a. Notice in writing must be given to the School Board at least six (6) months prior to the date of expected birth.
- b. Termination of employment of an expectant mother shall become effective at least four (4) months prior to the expected birth of the child. Termination of employment may be extended if the superintendent receives written recommendations from the expectant mother's physician and her principal, and if the superintendent feels that an extension will be in the best interest of the pupils and school involved.
- c. Maternity Leave
 1. Maternity leave must be requested in writing at the time of termination of employment.
 2. Maternity leave will be granted only to those persons who have a record of satisfactory performance.
 3. An individual will be declared eligible for re-employment when she submits written notice from her physician that

2, 1970, advising that her estimated date of delivery was April 28, 1971. Initially she requested that she be permitted to continue teaching until April 1, 1971. She supplied a certificate of her doctor that she could continue working as long as she chose. When her request was denied by the school board's personnel, she renewed her request to the board itself, amending it to suggest as an alternative leave date January 21, 1971, at the end of the first semester for the classes she was teaching.² This request was also denied and she was granted leave effective December 18, 1970. Suit was subsequently brought.³

she is physically fit for full-time employment, and when she can give full assurance that care of the child will cause minimal interference with job responsibilities.

4. Re-employment will be guaranteed no later than the first day of the school year following the date that the individual was declared eligible for re-employment.
5. All personnel benefits accrued, including seniority, will be retained during maternity leave unless the person concerned shall have accepted other employment.
6. The school system will have discharged its responsibility under this policy after offering re-employment for the first vacancy that occurs after the individual has been declared eligible for re-employment.

² The principal of Mrs. Cohen's school had previously requested that she be permitted to teach until the end of the first semester, January 21, 1971. From the standpoint of minimizing disruption of the education process of her students, this would seem to have been a sensible request. However, blind adherence to the regulation, or the board's convenience in providing a replacement, or possibly the replacement's convenience in beginning work, was permitted to prevail.

³ In addition to seeking redress of an alleged denial of equal protection the complaint sought relief under the Equal Employment Opportunity Act, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a):

It shall be an unlawful employment practice for ~~an~~ employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect

The district court found that there was neither medical reason nor administrative justification for that aspect of the school board's regulation which required that maternity leave begin no later than the end of the fifth month of pregnancy, and that therefore there was no valid basis to treat it differently from leave for other medical disabilities. As a legal consequence, the court concluded, the regulation was discriminatory without rational basis, and thus violative of the equal protection clause.

II

The school board contends that the regulation does not discriminate against woman as such; it only discriminates between pregnant teachers and other teachers. "The fact of pregnancy, rather than sex, is the focus of the regula-

to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

At the time of the proceedings below, however, state agencies and educational institutions were specifically exempted from the Act. 42 U.S.C. § 2000e(b); 42 U.S.C. § 2000e-1. Subsequent to oral argument, these exemptions were repealed by the Equal Employment Opportunity Act of 1972, P.L. 92-261, signed by the President March 24, 1972 and effective immediately. On April 5, 1972, the Equal Employment Opportunity Commission adopted guidelines (a) declaring that exclusion of employees "from employment . . . because of pregnancy is in *prima facie* violation of Title VII" (29 C.F.R. § 1604.10(a), and (b) requiring employers to treat disabilities caused by pregnancy and childbirth like other temporary disabilities (29 C.F.R. § 1604.10(b)). Rules and practices of the defendant in effect when the defendant was exempt from the Act cannot be the basis for a violation of that Act, even though, as the *amicus* correctly points out, they are entitled to "great deference" in interpreting the Act. *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971).

We will confine ourselves to consideration of the rights and liabilities of the parties under the equal protection clause of the fourteenth amendment. We recognize that, in view of the enactment of the 1972 Act, our decision will have limited precedential value except to sustain the maternity leave and pregnancy guidelines promulgated under that Act against constitutional attack.

tion." (Appellants' Brief p. 5). As to the pregnant school teacher, so the argument runs, the discrimination is permissible because of the need to provide continuity of education in the classroom. Stated otherwise, a uniform date for the beginning of maternity leave is necessary to avoid disruption in the classroom by a sudden and unpredictable need to replace a teacher who delivers prematurely or who suffers a complication of pregnancy necessitating her absence from the classroom.

While superficially appealing, we think this argument lacking in merit and indeed a disingenuous one to be advanced on this record. The record is clear that there is not a high incidence of risk of premature delivery or complications of pregnancy in the beginning of the third trimester of pregnancy—the date that the regulation establishes as the beginning of maternity leave. And on the facts of this case, we can reasonably infer that continuity of the educational process would have been better preserved had Mrs. Cohen been permitted to complete the semester, rather than to subject her students to a new teacher at an illogical and avoidable breaking point in the curriculum.

But there is a more fundamental defect in the school board's argument. That the regulation is a discrimination based on sex, we think is self-evident. The inescapable truth is as Chief Judge Brown of the Fifth Circuit has stated, dissenting from denial of a motion for rehearing in banc in *Phillips v. Martin-Marietta Corporation*, 416 F.2d 1257, 1259 (5 Cir. 1969), a case in which an employer who was willing to hire men with preschool age children for a certain position but not women was held not to have violated Title VII of the Civil Rights Act of 1964:

The distinguishing factor seems to be motherhood versus fatherhood. The question then arises: Is this sex-related? To the simple query the answer is just as simple: Nobody—and this includes Judges Solo-

monic or life tenured—has yet seen a male mother. A mother, to oversimplify the simplest biology, must then be a woman.

Chief Judge Brown's analysis was echoed by Judge Wisdom, also in dissent in *Schattman v. Texas Employment Commission*, 459 F.2d 32, 42 (5 Cir. 1972), a case asserting the validity of a Texas regulation requiring a pregnant state employee to begin maternity leave not later than two months before her predicted delivery date: "Female employees are the only employees . . . who become pregnant; it follows that they are provisionally dismissed from work on account of their sex. . . ."

We need not concern ourselves with the applicable test to discriminate validly on the basis of sex—whether "rational relationship to a state objective," *Reed v. Reed*, — U.S. —, — (1971); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970), or a compelling state interest, *Shapiro v. Thompson*, 394 U.S. 618 (1969)—because under either, we think the regulation denies equal protection. The record is literally devoid of any reason, medical or administrative, why a pregnant teacher must accept an enforced leave by the end of the fifth month of pregnancy if she and her doctor conclude that she can perform her duties beyond that date. Of course her employer is entitled to reasonable notice of when they conclude her leave should begin, so as to enable the employer to provide an adequate substitute, but it would seem that in most instances notice of not more than thirty days would be ample for that purpose. We cannot find in the record, nor can we imagine, any justification for requiring greater certainty as to the effective leave date of a pregnant teacher than of any other teacher, male or female, who may be absent for a prolonged period as a result of illness, emergency surgical procedure, or elective surgical procedure.

Thus, we are in agreement with, and have concluded to follow, the Sixth Circuit's decision in *LaFleur v. Cleveland*

Board of Education, — F.2d — (July 27, 1972) holding invalid, as a denial of equal protection of the laws, a maternity leave regulation which, like that in the case at bar, required a teacher to begin maternity leave not later than five months before the expected date of normal birth of her child, but which, incidentally, required only two weeks notice of the fact of pregnancy and prohibited the teacher's return to her duties earlier than three months after the child's birth. Both the enforced leave before and after birth were held impermissible, because there was lacking, as here, medical evidence or any other valid reason to support the extended period of mandatory leave. While the court recognized that continuity of classroom instruction and relief of burdensome administrative problems would both be served if the regulation were upheld, it concluded that these problems were no more acute with respect to pregnant teachers than other teachers, male or female, who suffered other actual disabilities; and moreover, that administrative convenience could not be permitted to override "the determinative issues of competence and care" (Stanley v. Illinois, — U.S. —, — (April 3, 1972)). Rejected also was the argument that the teacher was bound by her employment contract which required adherence to the regulation because "constitutional protection does extend to the public servant whose exclusion . . . is patently arbitrary or discriminatory." Wieman v. Updegraff, 344 U.S. 183, 192 (1952).

Additional support for our views and those of the Sixth Circuit is found in Robinson v. Rand, — F.S. — (D. Colo. 1972); Doe v. Osteopathic Hospital of Wichita, 333 F.S. 1357 (D. Kan. 1971); Williams v. School District, — F.S. — (N.D. Cal. 1972); Monell v. Dept. of Social Services, — F.S. — (S.D. N.Y. 1972). There is a contrary dictum in the split decision in Schattman v. Texas Employment Commission, supra, indicating that a maternity leave regulation requiring leave to begin not later than two months before the expected delivery date would be

valid; but, without expressing any view on the correctness of the dictum, we agree with the Sixth Circuit in *LaFleur* that *Schattman* is distinguishable from the instant case on its facts.

AFFIRMED

HAYNSWORTH, Chief Judge, dissenting:

If Mrs. Cohen's complaint was of arbitrariness in denying her requested extension of her maternity leave commencement date from December 18 to January 22 and there was proof that a qualified replacement teacher could have been obtained as readily on the latter date as on the former, I would endorse her position. She has undertaken no such showing, however. She stands squarely on a broader constitutional claim which would entirely exclude school officials from participation in the decision on the date of the start of maternity leave. That is for her, alone, to determine, she says, else she is subject to impermissible discrimination based upon sex.

On this record, we cannot deal with some imagined lesser claim. We must accept the larger claim, as the majority does, or reject it as I would.

I think, first, that the regulation is not an invidious discrimination based upon sex. It does not apply to women in an area in which they may compete with men. Secondly, school officials have a duty to provide, as best they can, for continuity in the instruction of children and, to that end, they have a legitimate interest in determining reasonable dates for the commencement of maternity leaves and a right to fix them.

I do not accept Mrs. Cohen's premise that the regulation's provision which denies her, with the advice of her doctor, the right to decide when her maternity leave will begin is an invidious classification based upon sex which may be justified only by some compelling state interest.

Such invidious discriminations are found in situations in which the sexes are in actual or potential competition. A statutory preference for men over women in the appointment of administrators was recently stricken by the Supreme Court as quite unjustified by considerations of administrative convenience.¹

Only women become pregnant; only women become mothers. But Mrs. Cohen's leap from those physical facts to the conclusion that any regulation of pregnancy and maternity is an invidious classification by sex seems simplistic. The fact that only women experience pregnancy and motherhood removes all possibility of competition between the sexes in this area. No man-made law or regulation excludes males from those experiences, and no such laws or regulations can relieve females from all of the burdens which naturally accompany the joys and blessings of motherhood. Pregnancy and motherhood do have a great impact on the lives of women, and, if that impact be reasonably noticed by a governmental regulation, it is not to be condemned as an invidious classification.

We are not accustomed to thinking, as sex classifications, of statutes making it a crime for a man forcefully to ravish a woman or, without force, carnally to know a female child under a certain age. Military regulations requiring all personnel to be clean shaven may be suspect on other grounds, but not because they have no application to females. Prohibition or licensing of prostitution is a patent regulation of sexual activity, the burden of which falls solely on females, but it has not been thought an invidious sex classification. What of regulations requiring adult women sunning themselves on a public beach to keep their breasts covered? Is that an invidious discrimination based upon sex, a denial of equal protection because the flat and hairy chest of a male lawfully may be exposed?

¹ Reed v. Reed, 404 U.S. 71.

The situation confronting us is not unlike that which occasioned the memorable lament of Anatole France, "the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."² Concern that the weight of the law falls more heavily upon the poor has been with us for years. Undoubtedly, some laws are directed to offenses which are unlikely to be committed by the wealthy, but there are also crimes which no poor person could commit. If the rich are unlikely to find spaces beneath bridges havens of rest, poor people are unlikely to find an opportunity to embezzle the funds of a national bank³ or to perpetrate a stock fraud.⁴ There are some laws which are not likely to be violated by the rich; there are others which are not likely to be violated by the poor. France stated his lament as he looked at some of such laws from the perspective of the poor, but the law may hold all of us accountable for anti-social conduct despite the differences in the temptations which confront us.

How can the state deal with pregnancy and maternity in terms of equality with paternity? It cannot, of course. The disabilities and preoccupations of maternity are visited but slightly upon the father. However sympathetic he may be, it is she who must shoulder the principal problems of pregnancy, the labors of childbirth and the care and feeding of the child in the early months of its life.

Pregnancy and maternity are *sui generis*, and a governmental employer's notice of them is not an invidious classification by sex.

Still, the regulation must serve some reasonable objective. I think it does.

² A. France, *The Red Lily* (1894).

³ 18 U.S.C. §§ 644, 656.

⁴ 15 U.S.C. §§ 78n, 78ff.

Here, I may take note of the fact that Mrs. Cohen attempts to confine her attack to the rules under which the time of commencement of maternity leave is determined. There she likens pregnancy to illness and other physical disability contending that failure to treat pregnancy as other disabilities is an unwarranted discrimination.⁵

I think our view should encompass the whole regulation.

There are obvious difficulties in the way of drawing a perfect analogy, as Mrs. Cohen would, between the several conditions contemplated by the maternity leave regulations and physical disabilities.

In the first place, the maternity leave policy of this school system covers an indefinite period of time, after delivery, when the young mother may wish to breast feed her baby or otherwise devote herself primarily to its care. A few weeks after a normal delivery, a healthy young mother is suffering no physical disability. If she chooses to remain on maternity leave for some months thereafter, she does so because of a temporary preference for child-care over a return to teaching and not because of anything remotely resembling illness or physical incapacity.

Even pregnancy is not like illnesses and other disabilities. In this age of wide use of effective contraceptives, pregnancy is usually voluntary. No one wishes to come down with mononucleosis or to break a leg, but a majority of young women do wish to become pregnant, though they seek to select the time for doing so. Female school teachers, like other young women, plan to become pregnant.⁶

⁵ Her reasoning would seem to invalidate the provision for extended post-delivery leave during which the teacher-mother has a continuing guarantee of reemployment.

⁶ Of course, all pregnancies among teachers, as with other women, are not voluntary. See *Love's Labor Lost: New Conceptions of Maternity Leave*, 7 *Harv. Civ. Rights—Civ. Liberties L. Rev.* 260, 283-84, 288.

Unlike most illnesses and other disabilities, too, pregnancy permits one to foresee its culmination in a period of confinement and to prepare for it. The employer of the pregnant woman need not wait until the clock has struck to search for a replacement. Unexpected illnesses and disabilities may compel resort to a pool of substitute teachers available for short periods of employment, but pregnancy assures an opportunity to secure a more permanent replacement. As planning precedes most pregnancies, planning for the arrangements they necessitate may go hand in hand with them.

That circumstance supplies the justification for the rule that puts the starting of maternity leave, after the fifth month of pregnancy, within the control of school officials rather than in that of each pregnant teacher.

Eighty per cent of the teachers employed in this school system are women. The system is large enough that the Board knows that a certain number of its teachers will become pregnant each year.⁷ It knows that many of them will be unable to perform teaching duties over a period of several or many months, while some will be unwilling to do so for several months after the baby's delivery. The pregnant teacher's absence is not only predictable; it is of much longer duration than absences caused by such relatively transitory things as respiratory infections and digestive upsets.

Extended absences of teachers can occasion highly objectionable discontinuity in the education of children. When an extended absence is foreseen, the interest of the children is served by the employment of a regular replacement rather than dependence upon a succession of substitutes. That interest is furthered by the rule which starts the maternity leave at the end of the fifth month of pregnancy with the

⁷ In addition to Mrs. Cohen, two others began maternity leave in December, 1970.

provision that the superintendent may postpone the time upon the teacher's request and with the approval of her doctor and her principal.⁸ Placing ultimate control in school officials rather than in each individual teacher, affords an opportunity for useful planning and specific commitments to replacement teachers, who, otherwise, might not be available.

Mrs. Cohen, in her contract, agreed to abide by the regulations.⁹ Her effort to avoid them insofar as she dislikes them in their application to her should not prevail, for the regulations are not without reason.¹⁰ Their purpose may reasonably be regarded as contributing to the better education of the pupils by enabling school officials to arrange a larger degree of continuity in their instruction.

For these reasons, I respectfully dissent.

⁸ There is no built-in protection against arbitrary application of the rule in particular cases. If extension were denied when no replacement was available or within weeks of the end of the school year, a different case would be presented. The reasonableness of that extension provision, reasonably applied, moderates the rigidity of the primary rule and deprives it of arbitrariness.

⁹ Concurring in *Healy v. James*, — U.S. —, —, Mr. Justice Rehnquist wrote:

“Cases such as *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), make it equally clear that the government in its capacity as employer also differs constitutionally from the government in its capacity as the sovereign executing criminal laws.”

¹⁰ See *McGowan v. Maryland*, 366 U.S. 420, 426.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 71-1707

MRS. SUSAN COHEN, *Appellee*,

v.

CHESTERFIELD COUNTY SCHOOL BOARD
AND DR. ROBERT F. KELLY, *Appellants*.
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, *Amicus Curiae*.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., District Judge.

Resubmitted January 2, 1973. Decided January 15, 1973.

Before Haynsworth, Chief Judge, Winter, Craven, Butzner, Russell, Field and Widener, Circuit Judges, en banc.

Samuel W. Hixon, III, (Williams, Mullen, and Christian, and Frederick T. Gray, Robert E. Eicher, Oliver D. Rudy and Morris E. Mason on brief) for Appellants, and Philip J. Hirschkop (John B. Mann on brief) for Appellee. (John de J. Pemberton, Jr., Acting General Counsel, Julia P. Cooper, Chief, Appellate Section, Ed Katze, District Attorney, Washington District Office, on brief) for Equal Employment Opportunity Commission.

HAYNSWORTH, Chief Judge:

In this action brought under 42 U.S.C. § 1983, the plaintiff challenges the maternity leave regulation of the Chesterfield County School Board on the ground that it deprives her of her rights to due process and to equal protection of the laws guaranteed under the Fourteenth Amendment to the Constitution.¹ The challenged rule requires, with limited flexibility, that teachers who become pregnant must go on maternity leave at the end of the fifth month of pregnancy.² This appeal is taken from the Dis-

¹ Mrs. Cohen's complaint sought relief also under the Equal Employment Opportunity Act, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a):

"It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; * * *."

At the time of the proceedings below, however, state agencies and educational institutions were specifically exempted from the Act. 42 U.S.C. § 2000e(b); 42 U.S.C. § 2000e-1. Subsequent to oral argument, these exemptions were repealed by the Equal Employment Opportunity Act of 1972, P.L. 92-261, signed by the President March 24, 1972 and effective immediately. Rules and practices of the defendant in effect when the defendant was exempt from the Equal Employment Opp. Act cannot be the basis for a violation of that Act. This opinion accordingly is limited to consideration of the rights and liabilities of the parties under the Equal Protection Clause of the Fourteenth Amendment.

² The maternity leave provisions of the Chesterfield County School Board provides:

"a. Notice in writing must be given to the School Board at least six (6) months prior to the date of expected birth.

b. Termination of employment of an expectant mother shall become effective at least four (4) months prior to the expected birth of the child. Termination of employment may be extend-

trict Court's decision that the maternity leave rule deprived Mrs. Cohen of equal protection: "Because pregnancy, though unique to women, is like other medical conditions, the failure to treat it as such amounts to discrimination which is without rational basis, and therefore is violative of the equal protection clause of the Fourteenth Amendment." *Cohen v. Chesterfield County School Board*, E.D.Va., 326 F.Supp. 1159, 1161.

When Mrs. Cohen became pregnant she was a social studies teacher at Midlothian High School in Chesterfield County. Her contract with the School Board required her to comply with all state and local school laws and regulations. In compliance with the Board's maternity provi-

ed if the superintendent receives written recommendations from the expectant mother's physician and her principal, and if the superintendent feels that an extension will be in the best interest of the pupils and school involved.

c. Maternity Leave

1. Maternity leave must be requested in writing at the time of termination of employment.
2. Maternity leave will be granted only to those persons who have a record of satisfactory performance.
3. An individual will be declared eligible for re-employment when she submits written notice from her physician that she is physically fit for full-time employment, and when she can give full assurance that care of the child will cause minimal interference with job responsibilities.
4. Re-employment will be guaranteed no later than the first day of the school year following the date that the individual was declared eligible for re-employment.
5. All personnel benefits accrued, including seniority, will be retained during maternity leave unless the person concerned shall have accepted other employment.
6. The school system will have discharged its responsibility under this policy after offering re-employment for the first vacancy that occurs after the individual has been declared eligible for re-employment.

sions, Mrs. Cohen notified the Board on November 2, 1970 that she was pregnant and that her estimated date of delivery was April 28, 1971. With the written opinion of her obstetrician that she could work as long as she chose, she requested an extension until April 1, 1971 of the date she would stop teaching. The School Board denied this request, granting her leave effective December 18, 1970. In a subsequent personal appearance before the Board, Mrs. Cohen made an alternate request of an extension until January 21, 1971—the end of the semester. This request, supported by a recommendation of her principal, was also denied. The District Court found that the basis of the denials of the requested extensions was that “the School Board had a replacement available, and felt it proper to abide by its regulation.”

The plaintiff asserts no claim of arbitrariness in the denial of the alternative request of an extension until January 21, 1971. She has made no attempt to show that a qualified replacement would have been as readily available then, or in April, as in December. She stands squarely on a broader constitutional claim which would entirely exclude school officials from participation in the decision on the date of the maternity leave. That is for her, alone, to determine, she says, else she is subject to impermissible discrimination based upon sex.

We conclude, first, that the regulation is not an invidious discrimination based upon sex. It does not apply to women in an area in which they may compete with men. Secondly, school officials have a duty to provide, as best they can, for continuity in the instruction of children and, to that end, they have a legitimate interest in determining reasonable dates for the commencement of maternity leaves and a right to fix them.

We do not accept Mrs. Cohen's premise that the regulation's provision which denies her, with the advice of her doctor, the right to decide when her maternity leave will begin is an invidious classification based upon sex which

may be justified only by some compelling state interest. Such invidious discriminations are found in situations in which the sexes are in actual or potential competition. A statutory preference for men over women in the appointment of administrators was recently stricken by the Supreme Court as quite unjustified by considerations of administrative convenience.³

Only women become pregnant; only women become mothers. But Mrs. Cohen's leap from those physical facts to the conclusion that any regulation of pregnancy and maternity is an invidious classification by sex is merely simplistic. The fact that only women experience pregnancy and motherhood removes all possibility of competition between the sexes in this area. No man-made law or regulation excludes males from those experiences, and no such laws or regulations can relieve females from all of the burdens which naturally accompany the joys and blessings of motherhood. Pregnancy and motherhood do have a great impact on the lives of women, and, if that impact be reasonably noticed by a governmental regulation, it is not to be condemned as an invidious classification.

We are not accustomed to thinking, as sex classifications, of statutes making it a crime for a man forcefully to ravish a woman, or, without force, carnally to know a female child under a certain age. Military regulations requiring all personnel to be clean shaven may be suspect on other grounds, but not because they have no application to females. Prohibition or licensing of prostitution is a patent regulation of sexual activity, the burden of which falls primarily on females, but it has not been thought an invidious sex classification. What of regulations requiring adult women sunning themselves on a public beach to keep their breasts covered? Is that an invidious discrimination based upon sex, a denial of equal protection because the flat and hairy chest of a male lawfully may be exposed?

³ Reed v. Reed, 404 U.S. 71.

The situation confronting us is not unlike that which occasioned the memorable lament of Anatole France, "the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."⁴ Concern that the weight of the law falls more heavily upon the poor has been with us for years. Undoubtedly, some laws are directed to offenses which are unlikely to be committed by the wealthy, but there are also crimes which no poor person could commit. If the rich are unlikely to find spaces beneath bridges havens of rest, poor people are unlikely to find an opportunity to embezzle the funds of a national bank⁵ or to perpetrate a stock fraud.⁶ There are some laws which are not likely to be violated by the rich; there are others which are not likely to be violated by the poor. France stated his lament as he looked at some of such laws from the perspective of the poor, but the law may hold all of us accountable for antisocial conduct despite the differences in the temptations which confront us.

How can the state deal with pregnancy and maternity in terms of equality with paternity? It cannot, of course. The disabilities and preoccupations of maternity are visited but slightly upon the father. However sympathetic he may be, it is she who must shoulder the principal problems of pregnancy, the labors of childbirth and the care and feeding of the child in the early months of its life.

Pregnancy and maternity are *sui generis*, and a governmental employer's notice of them is not an invidious classification by sex.

Still, the regulation must serve some reasonable objective. We think it does.

⁴ A. France, *The Red Lily* (1894).

⁵ 18 U.S.C. §§ 644, 656.

⁶ 15 U.S.C. §§ 78n, 78ff.

Here, we may take note of the fact that Mrs. Cohen attempts to confine her attack to the rules under which the time of commencement of maternity leave is determined. There she likens pregnancy to illness and other physical disability, contending that failure to treat pregnancy as other disabilities is an unwarranted discrimination.⁷

We think our view should encompass the whole regulation.

There are obvious difficulties in the way of drawing a perfect analogy, as Mrs. Cohen would, between the several conditions contemplated by the maternity leave regulations and physical disabilities.

In the first place, the maternity leave policy of this school system covers an indefinite period of time, after delivery, when the young mother may wish to breast feed her baby or otherwise devote herself primarily to its care. A few weeks after a normal delivery, a healthy young mother is suffering no physical disability. If she chooses to remain on maternity leave for some months thereafter, she does so because of a temporary preference for child-care over a return to teaching and not because of anything remotely resembling illness or physical incapacity.

Even pregnancy is not like illnesses and other disabilities. In this age of wide use of effective contraceptives, pregnancy is usually voluntary. No one wishes to come down with mononucleosis or to break a leg, but a majority of young women do wish to become pregnant, though they seek to select the time for doing so. Female school teachers, like other young women, plan to become pregnant.⁸

⁷ Her reasoning would seem to invalidate the provision for extended post-delivery leave during which the teacher-mother has a continuing guarantee of reemployment.

⁸ Of course, all pregnancies among teachers, as with other women, are not voluntary. See Love's Labor Lost: New Conceptions of Maternity Leave, 7 Harv. Civ. Rights—Civ. Liberties L. Rev. 260, 283-84, 288.

Unlike most illnesses and other disabilities, too, pregnancy permits one to foresee its culmination in a period of confinement and to prepare for it. The employer of the pregnant woman need not wait until the clock has struck to search for a replacement. Unexpected illnesses and disabilities may compel resort to a pool of substitute teachers available for short periods of employment, but pregnancy assures an opportunity to secure a more permanent replacement. As planning precedes most pregnancies, planning for the arrangements they necessitate may go hand in hand with them.

That circumstance supplies the justification for the rule that puts the starting of maternity leave, after the fifth month of pregnancy, within the control of school officials rather than in that of each pregnant teacher.⁹

Eighty per cent of the teachers employed in this school system are women. The system is large enough that the Board knows that a certain number of its teachers will become pregnant each year.¹⁰ It knows that many of them will be unable to perform teaching duties over a period of several or many months, while some will be unwilling to do so for several months after the baby's delivery. The pregnant teacher's absence is not only predictable; it is of much longer duration than absences caused by such relatively transitory things as respiratory infections and digestive upsets.

Extended absences of teachers can occasion highly objectionable discontinuity in the education of children. When an extended absence is foreseen, the interest of the children is served by the employment of a regular replacement

⁹ Since we conclude that continuity in instruction reasonably supports the rule we need not consider other personalized reasons advanced in support of the regulation.

¹⁰ In addition to Mrs. Cohen, two others began maternity leave in December, 1970.

rather than dependence upon a succession of substitutes. That interest is furthered by the rule which starts the maternity leave at the end of the fifth month of pregnancy with the provision that the superintendent may postpone the time upon the teacher's request and with the approval of her doctor and her principal.¹¹ Placing ultimate control in school officials rather than in each individual teacher, affords an opportunity for useful planning and specific commitments to replacement teachers, who, otherwise, might not be available.

Mrs. Cohen, in her contract, agreed to abide by the regulations.¹² Her effort to avoid them insofar as she dislikes them in their application to her should not prevail, for the regulations are not without reason.¹³ Their purpose may reasonably be regarded as contributing to the better education of the pupils by enabling school officials to arrange a larger degree of continuity in their instruction.¹⁴

Reversed.

¹¹ There is no built-in protection against arbitrary application of the rule in particular cases. If extension were denied when no replacement was available or within weeks of the end of the school year, a different case would be presented.

¹² Concurring in *Healy v. James*, — U.S. —, —, Mr. Justice Rehnquist wrote:

“Cases such as *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), make it equally clear that the government in its capacity as employer also differs constitutionally from the government in its capacity as the sovereign executing criminal laws.”

¹³ See, *McGowan v. Maryland*, 366 U.S. 420, 426.

¹⁴ The point is being widely litigated with diverse results. See, e.g., *Schattman v. Texas Employment Commission*, 5 Cir., 459 F.2d 32; *LaFleur v. Cleveland Bd. of Educ.*, N.D.Ohio, 326 F.Supp. 1208; *Doe v. Osteopathic Hospital of Wichita*, D.Kansas, 333 F. Supp. 1357; *Robinson v. Rand*, D.Colo., 340 F.Supp. 37; *Williams v. School District*, N.D.Calif., 340 F.Supp. 438; *Monell v. Dept. of Social Services*, S.D.N.Y., — F.Supp. —; *Danielson v. Bd. of*

WINTER, Circuit Judge, dissenting:

Because I disagree with the conclusion of the majority and because the majority's decision, if it prevails, may well be relied on to invalidate an aspect of the implementation of the Equal Employment Opportunity Act, Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2(a),¹ I respectfully dissent.

Educ. of the City Univ. of N.Y., S.D.N.Y., —F.Supp. —; Bravo v. Bd. of Educ., N.D.Ill. 345 F.Supp. 155; Cerra v. East Stroudsburg Area School District, Pa. Cmwlth., 285 A.2d 206.

¹ In addition to seeking redress of an alleged denial of equal protection, plaintiff's complaint sought relief under the Equal Employment Opportunity Act, Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2(a):

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

At the time of the proceedings below, however, state agencies and educational institutions were specifically exempted from the Act. 42 U.S.C.A. § 2000e(b); 42 U.S.C.A. § 2000e-1. Subsequent to oral argument, these exemptions were repealed by the Equal Employment Opportunity Act of 1972, P.L. 92-261, signed by the President March 24, 1972 and effective immediately. On April 5, 1972, the Equal Employment Opportunity Commission adopted guidelines (a) declaring that exclusion of employees "from employment . . . because of pregnancy is in *prima facie* violation of Title VII" (29 C.F.R. § 1604.10(a), and (b) requiring employers to treat disabilities caused by pregnancy and childbirth like other temporary disabilities (29 C.F.R. § 1604.10(b)).

Although rules and practices of the defendant in effect when the defendant was exempt from the Act cannot be the basis for a violation of that Act, even though, as the *amicus* correctly points out, they are entitled to "great deference" in interpreting the Act, *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971), the majority's holding is to the effect that constitutionally discrimina-

The majority concludes that the regulation does not discriminate against woman as such; it only discriminates between pregnant teachers and other teachers. "It [the regulation] does not apply to women in an area in which they compete with men." As to the pregnant school teacher, so the argument runs, the discrimination is permissible because of the need to provide continuity of education in the classroom.² Stated otherwise, a uniform date for the beginning of maternity leave is necessary to avoid disruption in the classroom by a sudden and unpredictable need to replace a teacher who delivers prematurely or who suffers a complication of pregnancy necessitating her absence from the classroom.

While superficially appealing, I am not persuaded by this argument and I think it a disingenuous one to be advanced on this record. The record is clear that there is not a high incidence of risk of premature delivery or complications of pregnancy in the beginning of the third trimester of pregnancy—the date that the regulation establishes as the beginning of maternity leave. And on the facts of this case, one can reasonably infer that continuity of the educational process would have been better preserved had Mrs. Cohen

tion between pregnant women and other women and men, on account of pregnancy, is permissible. It would seem to follow that a contrary regulation would be in excess of the statutory grant of authority.

² The record belies the benevolent purpose of the school officials ascribed to them by the majority: The principal of Mrs. Cohen's school had previously requested that she be permitted to teach until the end of the first semester, January 21, 1971. From the standpoint of minimizing disruption of the education process of her students, this would seem to have been a sensible request. However, blind adherence to the regulation, or the board's convenience in providing a replacement, or possibly the replacement's convenience in beginning work, was permitted to prevail. The board itself never articulated the reason for rejecting the recommendation of one who could be expected to have more intimate and accurate knowledge of the needs of the pupils affected than it.

been permitted to complete the semester rather than to subject her students to a new teacher at an illogical and avoidable breaking point in the curriculum.

But there is a more fundamental defect in the majority's opinion. That the regulation is a discrimination based on sex, I think is self-evident. The inescapable truth is as Chief Judge Brown of the Fifth Circuit has stated, dissenting from denial of a motion for rehearing in banc in *Phillips v. Martin-Marietta Corporation*, 416 F.2d 1257, 1259 (5 Cir. 1969), a case in which an employer who was willing to hire men with preschool-age children for a certain position but not women was held not to have violated Title VII of the Civil Rights Act of 1964:

The distinguishing factor seems to be motherhood versus fatherhood. The question then arises: Is this sex-related? To the simple query the answer is just as simple: Nobody—and this includes Judges, Solomonic or life tenured—has yet seen a male mother. A mother, to oversimplify the simplest biology, must then be a woman.

Chief Judge Brown's analysis was echoed by Judge Wisdom, also in dissent in *Schattman v. Texas Employment Commission*, 459 F.2d 32, 42 (5 Cir. 1972), a case asserting the validity of a Texas regulation requiring a pregnant state employee to begin maternity leave not later than two months before her predicted delivery date: "Female employees are the only employees . . . who become pregnant; it follows that they are provisionally dismissed from work on account of their sex . . ."

I need not concern myself with the applicable test to discriminate validly on the basis of sex—whether "rational relationship to a state objective," *Reed v. Reed*, — U.S. —, — (1971); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970), or a compelling state interest, *Shapiro v. Thompson*, 394 U.S. 618 (1969)—because under either, I think the regulation denies equal protection. The record is

literally devoid of any reason, medical or administrative, why a pregnant teacher must accept an enforced leave by the end of the fifth month of pregnancy if she and her doctor conclude that she can perform her duties beyond that date. Of course her employer is entitled to reasonable notice of when the teacher and her doctor conclude her leave should begin, so as to enable the employer to provide an adequate substitute, but it would seem that in most instances notice of not more than thirty days would be ample for that purpose. If I put aside instances where a teacher, male or female, suffers a sudden illness or the need for emergency surgery, and where presumably the teacher has little or no notice of impending prolonged absence, I cannot find in the record, nor can I imagine, any justification for requiring greater certainty as to the effective leave date of a pregnant teacher than of any other teacher, male or female, who may be absent for a prolonged period as a result of elective surgical procedure.

To give an example of my last statement, prostatitis is peculiarly a male disease and in this sense sex related. A prostatectomy which may be required as a result of prostatitis or other chronic disease of the prostate, is rarely performed as an emergency surgical procedure. Rather, within a reasonable time range, the date for a prostatectomy is scheduled for a date suiting the availability of the hospital and the convenience of the surgeon and the patient. Under general sick leave regulations, a male teacher planning to undergo a prostatectomy is not required to give advance notice of the contemplated operation or to begin sick leave at any specific date, even at a semester break if one should intervene, prior to the operation, or to seek permission to continue work until the operation. Least it be thought that an elective prostatectomy among male teachers is a rare event, I stress that the general sick leave requirements contain no requirement of notice, a mandatory beginning of sick leave or continuation of employment after notice until surgery for *any* elective surgery for *any* teach-

er, male or female. Yet it cannot be said that the disruptive effect on the students or the burden on the school administration is any less in the case of any elective surgery than the disruption and burden occasioned by a pregnant teacher's absenting herself to deliver. Indeed, it would be greater since the pregnant teacher would have been required to give notice of her impending confinement and thus school officials would have had ample time in which to find a replacement. To me, the discrimination is obvious.

I agree with the Sixth Circuit's decision in *LaFleur v. Cleveland Board of Education*, — F.2d — (July 27, 1972) holding invalid, as a denial of equal protection of the laws, a maternity leave regulation which, like that in the case at bar, required a teacher to begin maternity leave not later than five months before the expected date of normal birth of her child, but which, incidentally, required only two weeks notice of the fact of pregnancy and prohibited the teacher's return to her duties earlier than three months after the child's birth. Both the enforced leave before and after birth were held impermissible, because there was lacking, as here, medical evidence or any other valid reason to support the extended period of mandatory leave. While the Court recognized that continuity of classroom instruction and relief of burdensome administrative problems would both be served if the regulation were upheld, it concluded that these problems were no more acute with respect to pregnant teachers than other teachers, male or female, who suffered other actual disabilities; and moreover, that administrative convenience could not be permitted to override "the determinative issues of competence and care" (*Stanley v. Illinois*, — U.S. —, — (April 3, 1972)). Rejected also was the argument that the teacher was bound by her employment contract which required adherence to the regulation because "constitutional protection does extend to the public servant whose exclusion ... is patently arbitrary or discriminatory." *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952).

Additional support for my views is found in *Robinson v. Rand*, — F.S. — (D. Colo. 1972); *Doe v. Osteopathic Hospital of Wichita*, 333 F.S. 1357 (D. Kan. 1971); *Williams v. School District*, — F.S. — (N.D. Cal. 1972); *Monell v. Dept. of Social Services*, — F.S. — (S.D. N.Y. 1972); *Bravo v. Board of Education*, — F.S. — (N.D. Ill. 1972); *Heath v. Westerville Board of Education*, 345 F.S. 501 (S.D. Ohio 1972). There is a contrary dictum in the split decision in *Schattman v. Texas Employment Commission*, *supra*, indicating that a maternity leave regulation requiring leave to begin not later than two months before the expected delivery date would be valid; but, without expressing any view on the correctness of the dictum, I agree with the Sixth Circuit in *LaFleur* that *Schattman* is distinguishable from the instant case on its facts.

Judge Craven and Judge Butzner authorize me to say that they join in this opinion.

**29 C.F.R. 1604.10 Employment Policies Relating to
Pregnancy and Childbirth.**

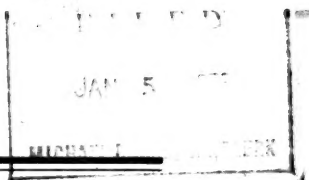
(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in *prima facie* violation of Title VII.

(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to

pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.

CORRECTED
COPY



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

No. 72-777

CLEVELAND BOARD OF EDUCATION, *et al.*,
Petitioner.

v.

JO CAROL La FLEUR, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

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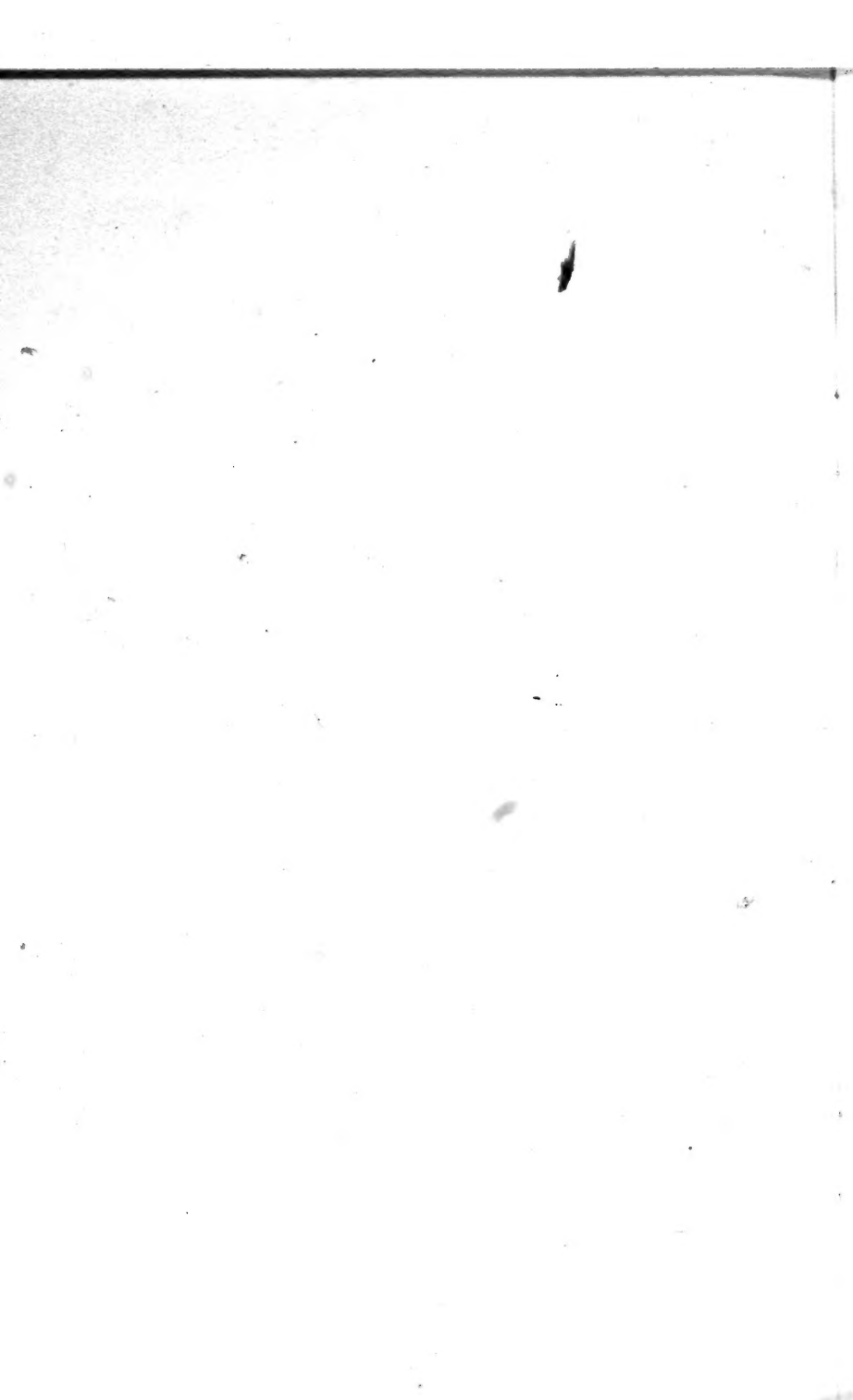


TABLE OF CONTENTS

CITATIONS TO OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED FOR REVIEW	2
CONSTITUTIONAL PROVISION INVOLVED.....	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	5
1. The decision below is in harmony with the decision of this Court in <i>Reed v. Reed</i> , and other recent decisions of this Court	5
2. The question in controversy no longer has the importance it had when heard by the District Court or by the Court of Appeals	7
CONCLUSION.....	9

TABLE OF AUTHORITIES

Cases:

<i>Eisenstadt v. Baird</i> , 405 U.S. 438 (1972).....	6
<i>Reed v. Reed</i> , 404 U.S. 71 (1971).....	5, 6, 7
<i>Schattman v. Texas Employment Commission</i> , 459 F.2d 32 (5th Cir., 1972), Petition for cert. filed 41 U.S.L.W. 3157 (Sept. 21, 1972) (No. 474)	8
<i>Stanley v. Illinois</i> , 405 U.S. 645 (1972)	6
<i>Struck v. Secretary of Defense</i> , 460 F.2d 1372 (9th Cir. 1971, 1972), vacated and remanded, ___ U.S. ___ 41 U.S. L.W. 3346 (Dec. 18, 1972).....	9

Constitutional Provisions:

U.S. Constitution, 14th Amendment.....	<i>passim</i>
--	---------------

Statutes:

28 U.S.C. § 1254(1).....	2
28 U.S.C. § 1343 (3)	3

(ii)

28 U.S.C. § 1343 (4) 3

42 U.S.C. § 1983 3, 7

Title VII of the Civil Rights Act of 1964, as amended
(1972), 42 U.S. § 2000(e) 7

Other:

Guidelines on Discrimination Because of Sex, 29

C.F.R. Sec. 1604.10 (b), et. seq., as amended,
(1972) 8

Conference Report on H.R. 1746 — EQUAL EMPLOY-

MENT OPPORTUNITY ACT OF 1972, Section by
Section Analysis, H.R. Rep. No. 1861, 92nd Cong.,
2nd Sess. 35 (1972) 8

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BRIEF FOR RESPONDENTS IN OPPOSITION

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals is reported in 465 F.2d 1184 (1972). That Court's order denying rehearing (Pet. App. A26-27) is not reported. The opinion of the District Court is reported in 326 F. Supp. 1208 (1971).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 27, 1972 (Pet. App. A14-25). A motion for a rehearing and suggestion for a hearing *en banc* was denied on August 29, 1972 (Pet. App. A26-27). The petition for a writ of certiorari was filed on November 26, 1972. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

QUESTION PRESENTED FOR REVIEW

Does a Cleveland Board of Education regulation requiring a pregnant teacher to take at least an eight-month leave of absence from her job, without pay and regardless of her ability and desire to continue working, violate the Equal Protection clause of the Fourteenth Amendment?

The District Court answered this question, "No." The Court of Appeals answered, "Yes." Respondents contend the answer of the Court of Appeals is correct and should not be reviewed.

CONSTITUTIONAL PROVISION INVOLVED

U. S. Const. Amend. XIV, Sec. 1

"....; nor shall any state ... deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

At the time of the filing of their complaints, Mrs. La Fleur and Mrs. Nelson had both been forced to leave their teaching positions in the Cleveland Public Schools. Mrs.

La Fleur had been placed involuntarily on a maternity leave of absence; Mrs. Nelson had been terminated. Both Plaintiffs asserted jurisdiction of the United States District Court under the Civil Rights Act of 1871, 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) and (4), and their two cases were consolidated by the District Court for hearing.

Shortly prior to hearing the Board of Education conceded that Mrs. Nelson would be placed on maternity leave but pointed out that she would have no right to reinstatement since her teaching contract would expire before she could regain eligibility to return to work under the maternity policy.

At the hearing, Dr. Mark C. Schinnerer, Superintendent of the Cleveland Public Schools twenty years ago when the mandatory maternity rule was first adopted, testified that the rule was devised to prevent children from giggling and laughing at teachers once their pregnant condition became apparent. On this evidence, the District Court found that the primary purpose for the initiation of the rule was protection of the continuity of the classroom program.

Other evidence introduced at hearing by the Board of Education included statistics relating to assaults by students on teachers, numbers of guns and knives confiscated from students, and numbers of teachers injured in school accidents. While this testimony itself was undisputed, its relevance was questioned since the Cleveland School Board was not able to provide a breakdown of its statistics with respect to injuries to or assaults upon pregnant teachers, or even with respect to its female teachers generally.

While the Cleveland Board of Education was permitted to present evidence both of a medical and of a psychological nature by a medical doctor, this evidence was not undisputed as Petitioners contend. A specialist in obstetrics and gynecology with 48 years of medical experience and herself a working mother testified on behalf of the Plaintiffs with respect to the ability of pregnant women to work. Respondents also sought to dispute evidence of a psychological nature testified to by the Petitioner's medical doctor but Respondents' witness, a child psychologist, was not permitted to testify to psychological effects of the mandatory maternity rule.

In reversing the District Court's ruling upholding the Cleveland School Board's mandatory maternity rule, the United States Court of Appeals for the Sixth Circuit considered Dr. Schinnerer's testimony that, if there were no rule, pregnant teachers would be subjected to 'pointing, giggling and . . . snide remarks' by the students. The Court of Appeals rejected embarrassment as a legally sufficient reason for mandating the relinquishment of employment rights. 465 F.2d at page 1187.

The Court of Appeals in its opinion also quoted from the testimony of the Board of Education's own medical expert admitting that he did not always advise his pregnant patients to stop working. The Court then held: "Under no construction of this record can we conclude that the medical evidence presented supports the extended periods of mandatory maternity leave required by the rule both before and after birth of the child." 465 F.2d at 1188.

Petitioners sought a rehearing of the Court of Appeals decision with a suggestion that rehearing be *en banc*. This

motion was denied by the Court of Appeals on August 29, 1972.

REASONS FOR DENYING THE WRIT

The petition for certiorari should be denied since the decision of the Court of Appeals is in harmony with recent decisions of this Court. In addition, in view of federal legislation and regulations now prohibiting state employers from adopting mandatory maternity leave rules, the question in controversy no longer has the importance that it did when heard by the District Court and argued to the Court of Appeals.

1. The decision below is in harmony with the decision of this Court in *Reed v. Reed* and other recent decisions of this Court.

The Petitioners appear in their brief to have misunderstood both the opinion of this Court in *Reed v. Reed*, 404 U.S. 71 (1971), and the opinion of the Court of Appeals in the present case. By misreading both opinions they have found themselves confronted with a conflict that does not exist.

While in *Reed v. Reed*, this Court adjudged the Idaho statute giving a mandatory preference to men for appointment as administrators of estates to be a violation of the Equal Protection Clause of the Fourteenth Amendment, the Court nowhere rejected the applicability of the strict standard of scrutiny to sex discrimination cases. Indeed, this Court has made clear that it did not need to consider application of the strict standard of review in *Reed v. Reed* since the statute there in question so clearly violated the more lenient "rational relation-

ship" test. *Eisenstadt v. Baird*, 405 U.S. 438, 447 n. 7 (1972).

As the Sixth Circuit Court of Appeals correctly understood, *Reed v. Reed* recognized that establishment of a mandatory preference for men merely to accomplish the elimination of hearings on the merits was "the very kind of arbitrary legislative choice forbidden by the Equal Protection clause of the Fourteenth Amendment". 465 F.2d at 1188, quoting 404 U.S. 71, 76-77. Subsequent to its decision in *Reed v. Reed*, this Court again recognized that use of the more lenient standard of review nevertheless does not permit every classification based on sex to survive judicial review. Dealing with an Illinois statute mandating the presumption that an unwed father was not entitled to the same right to custody of his natural children as was their natural mother during her lifetime, the Court of Appeals below has quoted this Court's statement that:

"Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand." 465 F.2d at 1186 quoting from *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 1215 (1972). (Footnotes omitted).

Recognizing that "there is a marked trend of cases to invalidate regulations based on sex classifications unless supported by a valid state interest", the Court of Appeals below also cited numerous decisions of state and lower federal courts invalidating sex-based classifications using the "rational relationship" test. 465 F.2d at 1188-1189.

Given the recent authority of this Court and also the trend of other courts to the same effect, it is not surprising that the Sixth Circuit Court of Appeals, in holding the Petitioner's mandatory maternity policy violative of the Equal Protection guarantee, like this Court earlier in *Reed v. Reed*, did not find it necessary to go beyond an examination of the maternity rule's constitutionality under the lenient standard of review. Despite the contention of the Petitioners to the contrary, the Court of Appeals did not adopt the strict standard of scrutiny in invalidating the Cleveland Board of Education's mandatory maternity rule; there therefore can be no question but that the decision of the Court of Appeals below is perfectly in harmony with prior decisions of this Court.

2. The question in controversy no longer has the importance it had when heard by the District Court and by the Court of Appeals.

When Mrs. La Fleur and Mrs. Nelson filed their complaints in District Court, with the sole exception of 42 U.S.C. § 1983, no federal legislation prohibited state employers from discriminating against their employees on the basis of sex. The Respondents therefore could only invoke the protection of the Fourteenth Amendment of the United States Constitution and undertake the task of demonstrating the classification of the Cleveland Board of Education to bear no reasonable relationship to a legitimate government objective.

In March 1972, Congress amended Title VII of the Civil Rights Act of 1964 extending coverage of the Act to public school teachers. 42 U.S.C. § 2000(e) as amended by P.L. 92-261. New sex discrimination guidelines issued

by the Equal Employment Opportunity Commission (EEOC) which the Petitioners admit are entitled to "great deference" (Pet. Br. p. 8) clearly provide that pregnancy must be treated like any other medical disability thereby prohibiting a mandatory maternity leave period longer than medically required. 29 Code of Fed. Reg. 1064.10(b).

While recognizing that neither the amendments to Title VII nor the new EEOC sex guidelines control the present case, the Court of Appeals pointed out that "they do tend to lessen the reach of our holding." 465 F.2d at 1186. Should this Court reverse the decision of the Court of Appeals, only the legality of subjecting the Respondents to the Board of Education's mandatory maternity policy would be decided; a determination of the legality of the mandatory maternity leave rule as applied to the Respondents' fellow teachers would then be required under Title VII of the Civil Rights Act. The present case therefore no longer holds the same importance that it did when originally filed almost two years ago.

Other cases cited by the Petitioners as conflicting with the Court of Appeals decision in the present case have also suffered a loss of importance since filing. *Schattman v. Texas Employment Commission*, 459 F.2d 32 (5th Cir. 1972), *petition for cert. filed* ____ U.S. ____ 41 U.S.L.W. 3157 (U.S. Sept. 21, 1972) (No. 474), a maternity discharge case variously treated by lower courts as a Title VII case and as a Fourteenth Amendment case, would, like the present case, if filed today, clearly fall under Title VII of the Civil Rights Act. 42 U.S.C. §2000(e)(c), CONFERENCE REPORT ON H.R. 1746, EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, Section by Section Analysis, H.R. Rep. No. 1861, 92nd Cong., 2nd Sess, 35 (1972). *Struck v.*

Secretary of Defense, 460 F.2d 1372 (9th Cir. 1971, 1972), vacated and remanded ____ U.S. ____, 41 U.S.L.W. 3346 (Dec. 18, 1972), a Fifth Amendment mandatory discharge case, was vacated by this Court and remanded to the Court of Appeals on December 18, 1972, for a determination of mootness following the decision of the Department of Defense to waive its requirement for discharge of the Petitioner on account of pregnancy.

It is therefore the view of the Respondents that the present case does not achieve sufficient importance to warrant review by this Court.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be denied.

Respectfully submitted,

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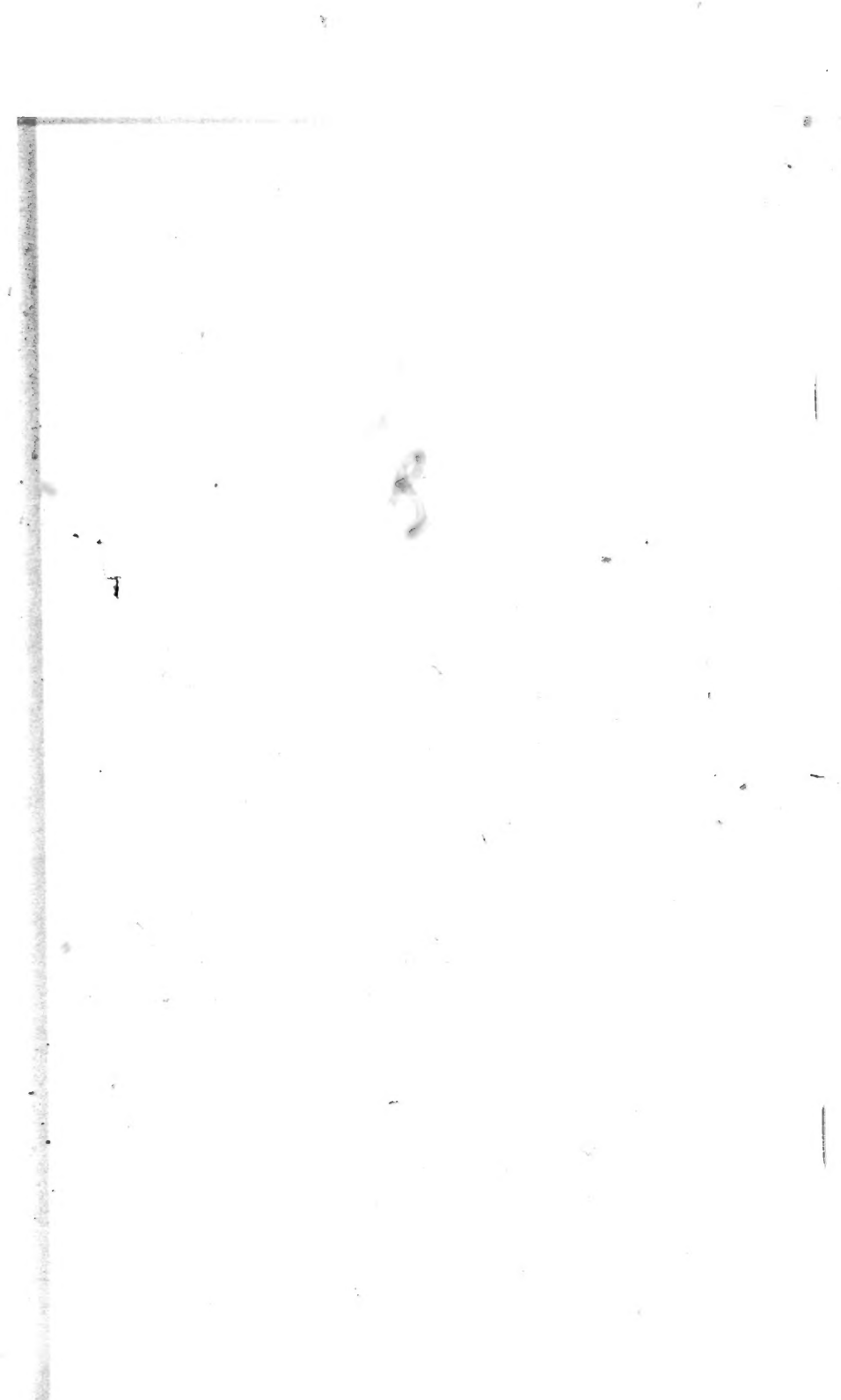
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December 1972



Supreme Court, U. S.
FILED

FEB 12 1973

MICHAEL ROOPK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-777

CLEVELAND BOARD OF EDUCATION, *et al.*,
Petitioners,

v.

JO CAROL LaFLEUR, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF TO
RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	<u>Page</u>
SUPPLEMENTAL BRIEF	1
CONCLUSION	5

TABLE OF AUTHORITIES

Cases:

Bravo v. Board of Education, 345 F. Supp. 155 (N.D. Ill. 1972)	4
Cerra v. East Stroudsburg Area School District, No. 359 (Pa. Sup. Ct. Jan. Term, 1972)	3, 5
Cohen v. Chesterfield County School Board, No. 71-1707 (4th Cir. Jan. 15, 1973)	4
Green v. Waterford Bd. of Education, et al., No. 72-1676 (2d Cir. Jan. 29, 1973)	2, 4
LaFleur v. Cleveland Bd. of Education, 326 F. Supp. 1208, 1220, 1213 (N.D. Ohio 1971)	2, 3
LaFleur v. Cleveland Board of Education, 465 F.2d 1184 (6th Cir. 1972)	3, 4
Monell v. Department of Social Services, 4 CCH EPD ¶7765 (S.D.N.Y 1972)	4
Pocklington v. Duval County School Board, 345 Supp. 163 (M.D. Fla. 1972)	4
Williams v. San Francisco United School District, 340 F. Supp. 438 (N.D. Cal. 1972)	4

Miscellaneous:

5 FEP Cases 116	2
4 CCH EDP ¶7607	3
Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §955(a)	3

(ii)

CONTENTS OF APPENDIX

Opinion of United States Court of Appeals for the Second Circuit, dated 1/29/73, in <i>Green v. Water- ford Board of Education</i>	1a
Opinion of the Supreme Court of Pennsylvania, Eastern District, dated 1/19/73, in <i>Cerra v. East Stroudsburg Area School District</i>	1b

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**SUPPLEMENTAL BRIEF TO
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This Supplemental Brief is being filed pursuant to Rule 24(5) of the Rules of this Court.

One federal appellate decision and one state supreme court decision bearing on the issue now before this Court have been rendered since Respondents filed their Brief in Opposition on December 26, 1972. Respondents therefore now file this Supplemental Brief.

In *Green v. Waterford Board of Education*, Case No. 72-1676, the Second Circuit Court of Appeals, on January 29, 1973, held a mandatory maternity rule requiring a teacher to take a leave without pay "not less than four months prior to expected confinement or at such earlier time as a replacement becomes available" to be in violation of the equal protection of the laws guaranteed by the Fourteenth Amendment to the U.S. Constitution. This order reversed the decision of the District Court for the District of Connecticut, which had dismissed the plaintiff's complaint. (The opinion of the District Court is reported at 5 FEP Cases 116.)

The Second Circuit points out that while men do not become pregnant, they:

... are also subject to crises of the body, some of which, like childbirth, give ample warning: A cataract operation or a prostatectomy, for example, may be planned months ahead. Because male teachers are not forced by defendant Board to take premature leave because of a known forthcoming medical problem, female teachers should not be treated differently. Thus stated, the argument is persuasive, even compelling. One realizes with a shock what so many women now proclaim: Old accepted rules and customs often discriminate against women in ways that have long been taken for granted or have gone unnoticed. (p. 1730, slip opinion of the Court.)

The Court in *Green* also has commented directly on the *LaFleur* case, stating:

An additional state interest—avoiding "classroom distractions" caused by embarrassed children "pointing, giggling, laughing and making snide remarks" about their teacher's condition—emerges from one of "the several cases" to which defendants

refer.¹⁶ We regard any such interest as almost too trivial to mention; it seems particularly ludicrous where, as here, plaintiff taught only high school students. Whatever may have been the reaction in Queen Victoria's time, pregnancy is no longer a dirty word.

¹⁶ *LaFleur v. Cleveland Bd. of Educ.*, 326 F. Supp. 1208, 1210, 1213 (N.D. Ohio 1971). As we note below, this decision was reversed by the Court of Appeals for the Sixth Circuit. (pp. 1732-1733, Slip Opinion of the Court.)

The Supreme Court of Pennsylvania has also recently invalidated a school board's mandatory maternity rule requiring teachers to resign no later than the end of their fifth month of pregnancy. In *Cerra v. East Stroudsburg Area School District*, No. 359 (Pa. Sup. Ct. Jan. Term, 1972), decided January 19, 1973, the State Supreme Court reversed the Pennsylvania Commonwealth Court below. (The opinion of the appellate Court is reported at 4 CCH EPD ¶ 7607.)

While the Supreme Court of Pennsylvania found it unnecessary to consider whether the mandatory leave policy violated the Fourteenth Amendment (holding the rule to be violative of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §955(a)), its opinion is nevertheless of relevance to the present case. The Pennsylvania Court found that "... Mrs. Cerra and other pregnant women are singled out and placed in a class to their disadvantage. They are discharged from their employment on the basis of a physical condition peculiar to their sex. This is sex discrimination pure and simple, since 'Male teachers, who might well be temporarily disabled from a multitude of illnesses, have not and will not be so harshly treated.'" (p. 6 of slip opinion.)

Although Petitioners argue in their Supplemental Brief that the decision of the Fourth Circuit on January 15, 1973, in *Cohen v. Chesterfield County School Board*, Case No. 71-1707, creates a conflict with the Sixth Circuit Court of Appeals, Respondents do not believe any lack of common view between these two circuits to be of sufficient importance to warrant the granting of a Writ of Certiorari. The *Cohen* reversal, a four to three decision, appears to be the act of a court in isolation: Respondents have been unable to find any other federal court,¹ or any state court of final jurisdiction upholding a school board's mandatory maternity leave policy. Federal district courts are now uniformly holding rules requiring a school teacher or a non-teaching employee of a school board to take a maternity leave of absence otherwise than when medically necessary to be a violation of equal protection. *Bravo v. Board of Education*, 345 F. Supp. 155 (N.D. Ill. 1972); *Pocklington v. Duval County School Board*, 345 F. Supp. 163 (M.D. Fla. 1972); *Monell v. Department of Social Services*, 4 CCH EPD ¶7765 (S.D.N.Y. 1972); *Williams v. San Francisco Unified School District*, 340 F. Supp. 438 (N.D. Cal. 1972). For this reason, and for others already stated by Respondents in their Brief in Opposition, there therefore appears to be no need for this Court to review the Sixth Circuit's decision in the present case.

For the Court's convenience, the opinion of the Second Circuit Court of Appeals in *Green, supra*, is

¹ Those few district courts that have upheld mandatory maternity leave policies of school boards have all been reversed on appeal. See, *Green v. Waterford Bd. of Education, et al.*, No. 72-1676 (2d Cir. Jan. 29, 1973); *LaFleur v. Cleveland Bd. of Education, et al.*, 465 F.2d 1184 (6th Cir. 1972).

attached hereto as Appendix A. The Pennsylvania Supreme Court's opinion in *Cerra, supra*, is set forth in Appendix B.

CONCLUSION

For the reasons set forth above, Respondents respectfully pray the Court to deny the Petition for Certiorari.

Respectfully submitted,

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February 1973



APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 213—September Term, 1972.

(Argued December 6, 1972 Decided January 29, 1973.)

Docket No. 72-1676

PRISCILLA B. GREEN,

Appellant,

—against—

WATERFORD BOARD OF EDUCATION, *et al.*,

Appellees.

Before:

LUMBARD, FEINBERG and MANSFIELD,

Circuit Judges.

Appeal from order of United States District Court for the District of Connecticut, M. Joseph Blumenfeld, *Chief Judge*, dismissing complaint under 42 U.S.C. § 1983 seeking damages for loss of salary on grounds that mandatory maternity leave rule violates equal protection clause.

Reversed and remanded.

MARTIN A. GOULD, Hartford, Conn. (Gould, Kilian & Krechevsky, on the brief) *for Appellant.*

MELVIN SCOTT, New London, Conn. (C. George Kanabis, Nareyz Dubicki, Traystnan, Scott, Kanabis & Shea, on the brief) *for Appellees.*

FEINBERG, Circuit Judge:

Plaintiff Priscilla B. Green, a school teacher, was forced by defendant Board of Education of the Town of Waterford, Connecticut, to take a leave of absence without pay from her job because of pregnancy, although she wanted to teach another two and one-half months and claimed to be able to do so. Arguing that the Board's inflexible maternity leave provision denied her the equal protection of the laws, plaintiff brought a civil rights action, 42 U.S.C. § 1983, in the United States District Court for the District of Connecticut. Chief Judge M. Joseph Blumenfeld dismissed plaintiff's complaint, and she appeals. We conclude that plaintiff stated a valid constitutional claim, and we reverse and remand for further appropriate proceedings.

I

The facts of the case are simple and in large part undisputed. In early September 1971, plaintiff was a non-tenured teacher of English at Waterford High School under a one-year employment contract with the Waterford Board of Education. At that time, she informed the principal of Waterford High School that she was pregnant, that her due date was about mid-February 1972, and that she wanted to continue teaching until January 31, 1972, which she characterized as the end of the first semester. Shortly thereafter, the Waterford Superintendent of Schools, defendant Charles J. Cupello, told plaintiff that her leave would start as soon as a suitable replacement could be found. Plaintiff tried to persuade the Board to let her continue to teach until the end of January, but this effort was fruitless. In a letter dated October 15, 1972 the Superintendent notified plaintiff that the Board had voted to grant her request for a maternity leave of absence "effective at such time as a suitable, certified replacement may be secured,"

in accordance with Article XIV of an agreement between the Board and defendant Waterford Education Association, the collective bargaining agent for teachers. The provisions of Article XIV, referred to in the letter, are set forth in the margin.¹ The key portion requires a maternity leave without pay to begin "not less than four months prior to expected confinement or at such earlier time as a replacement becomes available." Thereafter, the Superintendent notified plaintiff that a replacement had been secured, who would assume plaintiff's classroom duties on November 17, 1971, "at which time your maternity leave will commence." Soon after, plaintiff brought this suit in the district court.

The basis of plaintiff's action is that a mandatory maternity leave provision for teachers which fails to consider the physical ability of the individual and which treats pregnancy differently from any other form of disability deprives a pregnant teacher of rights guaranteed under the fourteenth amendment. The complaint sought an order requir-

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ARTICLE XIV—MATERNITY LEAVE

As soon as any teacher shall become aware of her pregnancy, she shall forthwith apply in writing to the Superintendent of Schools for a maternity leave of absence, and shall accept a leave of absence as provided by the Board of Education.

A maternity leave shall begin not less than four months prior to expected confinement or at such earlier time as a replacement becomes available. The leave shall extend only for the current year. This leave shall also be extended for the following school year for tenure teachers upon written request.

Teachers on maternity leave shall be placed on a waiting list for future appointment and shall have priority for a vacancy. Maternity leave shall not result in loss of accumulated sick leave or loss of tenure. This paragraph does not apply to non-tenure teachers.

Any woman who is aware of her pregnancy prior to August 1, shall only return to school in September at the discretion of the Superintendent.

For convenience, we sometimes refer to Article XIV as the "Board's rule," though we realize that defendant Waterford Education Association is a party to the agreement in which it is set forth.

ing defendants to permit her to teach "until such time as her gynecologist shall deem that she is physically unable to continue to teach, or until January 31, 1972, whichever shall sooner occur"; plaintiff alternatively sought damages for lost salary if forced to leave her job. Chief Judge Blumenfeld denied an application for preliminary injunctive relief on the ground that since money damages would be fully compensatory, there was no showing of possible irreparable injury. Plaintiff properly does not complain of this ruling. Her claim was then limited to damages for loss of salary from November 17, 1971, when her forced maternity leave began, to January 31, 1972. Defendants Board of Education and Cupello, [REDACTED], moved to dismiss for want of federal jurisdiction because plaintiff "failed to state . . . infringement of a Federally protected right." The judge treated the motion as one for summary judgment under Fed. R. Civ. P. 56² and ruled for defendants on the ground that "the maternity leave provision at issue is not so lacking in rational basis as to constitute a denial of equal protection."

II

This quotation from the district judge's opinion brings us to the threshold question of what standard of review to apply in testing the constitutionality of the Board's maternity leave rule. In recent years, the Supreme Court has developed what has been characterized as "a rigid two-

2 Citing *Berman v. National Maritime Union*, 166 F. Supp. 327, 332 (S.D.N.Y. 1958), and *Stella v. Kaiser*, 82 F. Supp. 301, 312 (S.D.N.Y. 1948), plaintiff claims that the court erred in viewing what was essentially a motion to dismiss under Fed. R. Civ. P. 12(b)(1) and (2) as a motion under 12(b)(6) and then treating it as a motion for summary judgment. In view of our disposition of the case, we need not consider this issue.

tier attitude"³ in equal protection cases. In most instances, statutory or regulatory classifications are presumptively constitutional and will not be disturbed unless they are without rational basis, resting "on grounds wholly irrelevant to the achievement" of some permissible state purpose. *McGowan v. Maryland*, 366 U.S. 420, 425 (1961); see *Morey v. Doud*, 354 U.S. 457, 463-64 (1957). In other cases, however, where the classification is grounded on certain "suspect" criteria, e.g., *Graham v. Richardson*, 403 U.S. 365, 372 (1971), or where the classification impinges upon certain "fundamental" rights, e.g., *Griffin v. Illinois*, 351 U.S. 12 (1956), "strict" judicial scrutiny is required, and the classification will not stand unless justified by some "compelling governmental interest." E.g., *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

Plaintiff strenuously urges that the stringent standard of review is appropriate here. She argues that her case involves both fundamental rights ("the right to work at one's chosen profession . . . [and] the right to bear children")⁴ and a classification based on sex, an inherently suspect criterion. The Supreme Court, however, has not yet added sex to the list of suspect classifications⁵—race, nationality, alienage—and while some courts⁶ and commen-

3 Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972).

4 Brief for Appellant at 16.

5 E.g., *Goesaert v. Cleary*, 335 U.S. 464 (1949). The question may be expressly decided in *Frontiero v. Laird*, 341 F. Supp. 201 (M.D. Ala. 1972) (3-judge court), prob. juris. noted, 41 U.S.L.W. 3165 (U.S. Oct. 10, 1972), argued before the Supreme Court on January 17, 1973, and now sub judice.

6 E.g., *United States ex rel. Robinson v. York*, 281 F. Supp. 8, 14 (D. Conn. 1968); *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529, 539-41 (Cal. Sup. Ct. 1971). Cf. *Seidenberg v. McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593, 606 (S.D.N.Y. 1970).

tators' have concluded otherwise, we accept *arguendo* the district court's assumption that rational basis scrutiny is the appropriate standard of review in this case. Cf. *Gruenwald v. Gardner*, 390 F.2d 591 (2d Cir. 1968).

In several cases from its past Term, however, the Court has suggested that rational basis scrutiny is not so deferential a standard of review as had been previously and generally supposed. First, the Court has apparently narrowed the linguistic gap between the two standards; it has avoided the terminology of two-tiered review in some cases, by posing instead certain fundamental inquiries applicable to "all" equal protection claims.⁷ Thus, in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), invalidating a Louisiana workmen's compensation law that discriminated against dependent unacknowledged, illegitimate children, the Court stated, 406 U.S. at 173, that the "essential inquiry" in all equal protection cases is

inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?⁸

And in *Police Department v. Mosley*, 408 U.S. 92 (1972), which held unconstitutional a Chicago ordinance that differentiated between types of peaceful picketing on the basis of subject matter, the Court stated, 408 U.S. at 95:

As in all equal protection cases, however, the crucial question is whether there is an appropriate govern-

7 E.g., Note, Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?, 84 Harv. L. Rev. 1499, 1507-08 (1971); 1972 Wisc. L. Rev. 626, 632-33.

8 See Gunther, *supra* note 3, at 17.

9 Justice Powell's opinion for the Court was joined by six other Justices. Justice Blackmun concurred in the result and Justice Rehnquist dissented.

mental interest suitably furthered by the differential treatment. See *Reed v. Reed*, 404 U.S. 71, 75-77 (1971); *Weber v. Aetna Casualty Co.*, 406 U.S. 164 (1972); *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972).¹⁰

Moreover, the Court seems far less willing to speculate as to what unexpressed legitimate state purposes may be rationally furthered by a challenged statutory classification. Compare *McGowan v. Maryland*, *supra*, 366 U.S. at 425-26, with *Gunther*, *supra* note 3, at 33 (discussing *Jackson v. Strange*, 407 U.S. 128 (1972)).

Finally, and perhaps most significantly, the Court's definition of what constitutes the necessary rational relationship between a classification and a legitimate governmental interest seems to have become slightly, but perceptibly, more rigorous. While under *McGowan v. Maryland*, *supra*, a classification is to be sustained unless it is "wholly irrelevant" to some permissible purpose, cases from the past Term spoke differently. In *Reed v. Reed*, 404 U.S. 71 (1971), for example, which struck down a section of the Idaho probate code giving mandatory preference to men over women when competing for the right to administer an estate, Chief Justice Burger stated for a unanimous Court, 404 U.S. at 76:

A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. . . ." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a

¹⁰ Justice Marshall's opinion for the Court was joined by five other Justices. Justices Blackmun and Rehnquist concurred in the result, and Chief Justice Burger concurred in a separate opinion.

rational relationship to a state objective that is sought to be advanced [Emphasis added.]

See also *Weber v. Aetna Casualty & Surety Co.*, *supra*, 406 U.S. at 175 ("The inferior classification of dependent unacknowledged illegitimates bears . . . no *significant relationship* to those recognized purposes . . . which workmen's compensation statutes commendably serve." [Emphasis added.]); cf. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

With these very recent indications of the proper inquiry in mind, cf. *Aguayo v. Richardson*, slip op. 1555, 1588-89 (2d Cir. Jan. 18, 1973), we turn to plaintiff's argument that the Board's maternity leave policy denied her the equal protection of the laws.

III

The heart of plaintiff's case is that disqualifying a physically capable woman from working because of a condition related solely to her sex is unconstitutionally discriminatory. Plaintiff admits the obvious, that men do not become pregnant, but points out that men, being human, are also subject to crises of the body, some of which, like childbirth, give ample warning: A cataract operation or a prostatectomy, for example, may be planned months ahead. Because male teachers are not forced by defendant Board to take premature leave because of a known forthcoming medical problem, female teachers should not be treated differently. Thus stated, the argument is persuasive, even compelling. One realizes with a shock what so many women now proclaim: Old accepted rules and customs often discriminate against women in ways that have long been taken for granted or have gone unnoticed.

But such a visceral reaction, of course, is not the end of the inquiry, although it serves well as the beginning. An equal protection argument requires careful analysis not

only of the effect of the claimed discrimination but also of the degree to which the discriminatory classification furthers legitimate state interests. Defendants in their brief and at oral argument have offered no direct justification for the rigid rule of Article XIV, but rely obliquely on "the several cases considering the problem of maternity leave clauses."¹¹ Indeed, we note that a principal problem on this appeal is an altogether abbreviated record, consisting of little more than plaintiff's verified complaint, defendant's answer, a few short interrogatories, the argument on the motion for a preliminary injunction, and the district judge's opinion. We thus have no assurance that any legitimate interest arguably promoted by the rule has been identified or articulated by the Board. Cf. *Gunther*, *supra* note 3, at 47. But giving defendants the benefit of the doubt, we will examine the rationality of the maternity leave rule in relation to those state interests principally suggested by Judge Blumenfeld: "concern for the [health and] safety of the teacher and her unborn child," continuity of education, and administrative convenience.

As to the Board's possible concern with health, plaintiff asked to remain on the job only "until such time as her gynecologist shall deem that she is physically unable to continue to teach, or until January 31, 1972, whichever shall occur sooner,"¹² so that her health or that of the unborn child would presumably not have been endangered had she continued to teach. At the hearing on a preliminary injunction, plaintiff was apparently prepared to support her claim with "Medical evidence regarding competency of a pregnant woman";¹³ while there is an intimation that de-

11 Brief for Appellees at 15.

12 Plaintiff's motion for preliminary injunction, at 1.

13 Transcript of hearing of November 17, 1971, at 3.

fendants intended to offer contrary evidence,¹⁴ this was not done. Why the Board should choose, by means of an inflexible rule, to manifest particular concern with the health of a pregnant woman, but not, for example, with the health of a teacher (male or female) recuperating from a heart attack is nowhere explained. In any event, we see little rationality in a rule that purports for reasons of health alone to treat all pregnancies alike rather than on a case-by-case basis. Cf. *Corsover v. Board of Examiners*, 298 N.Y.S. 2d 757 (Sup. Ct. Kings Co. 1968). We do not suggest that the Board would be bound by the judgment of plaintiff's doctor, but there was no individual assessment here of plaintiff's ability to continue to work.

As to safety, it is depressingly true these days that violence from students is a possibility, not pure fancy. Whether that possibility justifies treating pregnant teachers differently from male teachers is highly questionable. When the comparison is with other female teachers, any justification for focusing solely on those who are pregnant is still more dubious in the abstract and wholly so on this record.¹⁵ See Comment, Mandatory Maternity Leave of Absence Policies—An Equal Protection Analysis, 45 Temple L.Q. 240, 245 (1972). Furthermore, any rational rule motivated by interests in safety should logically take account of variations in the location of schools and in the age of students; the Board's maternity leave provision does not do so. An additional state interest—avoiding “classroom distractions” caused by embarrassed children “pointing, giggling, laughing and making snide remarks” about their teacher's condition—emerges from one of “the several

¹⁴ Id. at 12.

¹⁵ One of defendants' interrogatories to plaintiff asked whether she was “ever threatened or physically abused by any students.” Plaintiff replied that she had once been slapped in the face by a female student, without injury.

cases" to which defendants refer.¹⁶ We regard any such interest as almost too trivial to mention; it seems particularly ludicrous where, as here, plaintiff taught only high school students. Whatever may have been the reaction in Queen Victoria's time, pregnancy is no longer a dirty word. □

The only substantial justifications for the Board's maternity leave rule relate to continuity of classroom education and to administrative efficiency and convenience. As to these, the district judge said:

The plaintiff acknowledges that at some point prior to the birth of her child she would have had to take a maternity leave. It is not irrational that, in order to achieve an orderly transition between teachers, the Board of Education required substantial advance notice of her termination date. That the board, with the concurrence of the teachers' association, chose to fix that date at the end of five months of pregnancy was well within the bounds of reason. It was not required to go through a "battle of obstetricians" in each case to determine when a particular teacher would be required to leave before it could locate a replacement teacher and offer her a definite starting date.

Continuity of instruction is surely an important value. Where a pregnant teacher provides the Board with a date certain for commencement of leave, however, that value is preserved; an arbitrary leave date set at the end of the fifth month is no more calculated to facilitate a planned and orderly transition between the teacher and a substitute than is a date fixed closer to confinement. Indeed, the

16 *La Fleur v. Cleveland Bd. of Educ.*, 326 F. Supp. 1208, 1210, 1213 (N.D. Ohio 1971). As we note below, this decision was reversed by the Court of Appeals for the Sixth Circuit.

latter—as was the case here—would afford the Board more, not less, time to procure a satisfactory long-term substitute.¹⁷ There remains, of course, the possibility of premature childbirth or complications in the late stages of pregnancy, eventualities which might upset the best-laid plans of the teacher, the scheduled substitute, and the school board. However, there is nothing to indicate that these would be more than isolated instances. The Board must have substitute teachers generally available to replace any teacher suddenly incapacitated by acute illness or by any number of other causes. Any conclusion that these substitutes could not handle additional, pregnancy-related emergencies is pure speculation on this record. We do not denigrate the Board's interest in providing "orderly transition between teachers," but the relationship between the maternity leave rule and that interest seems insufficiently "fair and substantial" to pass constitutional muster.

Turning to the additional administrative convenience suggested of avoiding many "battles of obstetricians," we put to one side the thought that the district court's analysis could as well justify a much harsher rule, requiring maternity leave to start at the end of three months of pregnancy, or two. More to the point, a disagreement between physicians may arise any time a teacher's medical problems might, in the eyes of the school administration, inhibit satisfactory performance of classroom obligations at some point in the future; yet the Board apparently chose to avoid medical "battles" only in the case of pregnancy. The obvious rejoinder is that pregnant teachers

17 We also note that in any school operating under a semester system, plaintiff's departure on January 31 would be less disruptive of classroom continuity than a leave required, as here, to commence mid-semester. At oral argument, however, defendants claimed that Waterford had no formalized semester system. We are without sufficient factual data to accept or reject defendants' assertion.

constitute by far the most numerous group among those who might require medical leave and that the Board could, therefore, legitimately deal with the problem on a class, rather than on an individual, basis. Apart from the speculation of the district court, however, there is nothing in the record to support this proposition; on the contrary, we are told that the maternity leave rule has been recently amended precisely to provide for such individualized treatment. Even more significantly, *Reed v. Reed, supra*, indicates that the state interest in this sort of administrative convenience is not enough to justify an otherwise irrational statutory differentiation of the sexes. The Court there recognized that "the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy." 404 U.S. at 76. Nevertheless, it held that "[t]o give a mandatory preference [as administrators of estates] to members of either sex over members of the other, *merely to accomplish the elimination of hearings on the merits . . .*" (emphasis added), was forbidden by the equal protection clause. *Id.* While it might be easier for the Board to handle all maternity leave problems on an arbitrary, blanket basis, a reduced administrative workload is constitutionally insufficient to sustain this discriminatory treatment of pregnant women. See *Carrington v. Rash*, 380 U.S. 89, 96 (1965); cf. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

From the foregoing analysis, we conclude that the Board's maternity leave rule, which arbitrarily forces a physically capable woman like plaintiff to leave her job before required to do so for medical reasons, is discriminatory and that there are no "legitimate state interests" which the rule's rigid classification sufficiently promotes to justify such discriminatory treatment. This conclusion would not prevent the Board from considering the question

of leave for pregnant teachers on an individual basis as it apparently now does for non-pregnant teachers, female or male. We hold only that the particular Board rule before us denies plaintiff the equal protection of the laws.

Our conclusion is not altered by an examination of the decisions of other courts. Two closely divided courts of appeals, considering teacher maternity leave provisions substantially similar to the one before us, have reached diametrically opposite conclusions. Compare *LaFleur v. Cleveland Board of Education*, 465 F.2d 1184 (6th Cir. 1972) (2-1 decision) (mandatory leave provision is unconstitutional), rev'g 326 F. Supp. 1208 (N.D. Ohio 1971), petition for cert. filed, 41 U.S.L.W. 3315 (U.S. Nov. 27, 1972) (No. 72-777), with *Cohen v. Chesterfield County School Board*, — F.2d — (4th Cir. Jan. 15, 1973) (en banc; 4-3 decision) (contra), rev'g 326 F. Supp. 1159 (E.D. Va. 1971). In addition, in *Schattman v. Texas Employment Commission*, 459 F.2d 32, 38-41 (5th Cir. 1972), cert. denied, 41 U.S.L.W. 3372 (U.S. Jan. 8, 1973), the court held that a rule requiring pregnant employees to take a leave (without assurance of reinstatement) no later than "two months before the expected delivery date" did not deny equal protection.¹⁸ Federal district courts in Illinois, Florida, New York, and California have reached the same result as we do with respect to comparable maternity leave rules. *Bravo v. Board of Education*, 345 F. Supp. 155 (N.D. Ill. 1972); *Pocklington v. Duval County School Board*, 345 F. Supp. 163 (M.D. Fla. 1972); *Monell v. Department of Social Services*, 4 CCH Empl. Prac. ¶ 7765 (S.D.N.Y. Apr. 12, 1972); *Williams v. San Francisco Unified School District*,

¹⁸ Judge Wisdom, dissenting from the majority's first holding, that plaintiff's employer was not covered by Title VII, 42 U.S.C. § 2000e (b)(1), would have found a violation of that Act and did not reach the constitutional question. 459 F.2d at 41-43.

340 F. Supp. 438 (N.D. Cal. 1972) (non-teacher employee).¹⁹ In *Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971), vacated and remanded for consideration of mootness, 41 U.S.L.W. 3346 (U.S. Dec. 18, 1972), the Ninth Circuit upheld against an equal protection claim an Air Force regulation providing for discharge of pregnant women officers;²⁰ contra, *Robinson v. Rand*, 340 F. Supp. 37 (D. Colo. 1972). Obviously, the authorities are split, and for reasons already stated we prefer to align ourselves with those exemplified by the decision of the Sixth Circuit in *LaFleur*.

In sum, we conclude that plaintiff's complaint states a denial of equal protection of the laws and that summary judgment for defendants was erroneously granted. This, of course, does not end the case. Defendants have raised

19 Plaintiff cites guidelines and cases promulgated and decided under fair employment statutes. These not only emphasize the limited impact of our holding, *LaFleur*, *supra*, 465 F.2d at 1186, but provide additional support. Thus, Guidelines recently promulgated by the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-15, provide that an employment policy which excludes applicants or employees from employment due to pregnancy is prima facie in violation of the statute. § 1604.10(a), 37 Fed. Reg. 6837 (Apr. 5, 1972). The Guidelines further provide that questions of maternity leave are to be treated as would leave for other temporary disabilities. *Id.* § 1604.10(b). Title VII has been recently amended to apply to public school employees. Pub. L. 92-261, § 2 (Mar. 24, 1972). State agencies have reached similar results by way of adjudication. E.g., *Staten v. East Hartford Bd. of Educ.*, 1 CCH Empl. Prac. Guide § 5055, at 3113-15 [loose-leaf service] (Conn. Comm'n on Human Rights and Opportunities, Mar. 28, 1972).

20 On a petition for rehearing, Judge Duniway dissented, though he had originally concurred in the majority opinion; he believed reversal was compelled by the Supreme Court's decision in *Reed v. Reed*, *supra*, handed down one week after the majority opinion. See 460 F.2d at 1378-80. One Pennsylvania court has sustained a teacher maternity provision requiring termination of employment. *Cerra v. East Stroudsburg Area School Dist.*, 4 CCH Empl. Prac. ¶ 7607 (Pa. Comm. Ct. 1971).

additional defenses not yet considered by the court below. In addition, the amount of damages, if any, to which plaintiff is entitled remains to be determined. We thus remand for further proceedings consistent with this opinion.

Reversed and remanded.

APPENDIX B

[394]

**IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT****CHERYL CERRA,**
Appellant

v.

**EAST STROUDSBURG AREA
SCHOOL DISTRICT,**
Appellee

No. 359 January Term 1972

Appeal from the Order of the
Commonwealth Court to No.
445 C.D. 1971, affirming the
Order of the Court of Common
Pleas of Monroe County to No.
309 October Term 1970

Entered: April 4, 1972

OPINION OF THE COURT**EAGEN, J.** Filed: January 19, 1973

In September 1965, Cheryl Cerra, a married female, was employed by the East Stroudsburg School District in Monroe County [District] as a temporary professional employee. On June 20, 1967, upon the completion of two years of satisfactory service as a fourth-grade teacher, Mrs. Cerra entered into a written contract with the District under which she was given tenure. On July 17, 1967, the Board of School Directors of the District [Board] adopted a regulation requiring " that any employee who becomes pregnant shall resign effective not later than the end of the fifth (5th) month of the pregnancy;" On May 22, 1970, Mrs. Cerra received notice from the Superintendent of Schools of the District

that her employment was terminated immediately because she was more than five months pregnant.¹ On June 29, 1970, after an evidentiary hearing, the Board passed a resolution sustaining the termination of Mrs. Cerra's contract, [394-2] because: (a) of willful and persistent disobedience of a proper regulation of the Board, specifically, the regulation requiring resignation in the event of pregnancy; and (b) during the month of May 1970, "she lacked the physical ability or physical fitness to perform the required duties incident to her employment of teaching." Mrs. Cerra's offer to return to her employment with the District at the beginning of the new school term in September 1970 was refused.

Mrs. Cerra filed a timely appeal from the Board's resolution with the Secretary of Education of the Commonwealth [Secretary], who, subsequently, filed an opinion and order sustaining the Board's action solely on the ground Mrs. Cerra had persistently and willfully violated the regulation of the Board, requiring her to resign because of pregnancy. In his opinion the Secretary specifically stated the record "... fails to substantiate a charge of incompetency."

Mrs. Cerra then filed a petition for appeal from the Secretary's order in the Court of Common Pleas of Monroe County, pursuant to the provisions of Section 1132 of the Public School Code, Act of March 10, 1949, P.L. 30, as amended, 24 P.S. § 11-1132.² After a hearing

¹Mrs. Cerra gave birth to a child on July 27, 1970, after a normal term of gestation.

²Mrs. Cerra simultaneously instituted an action in assumpsit for salary due under her contract of employment with the District. A jury trial was waived and, after the testimony of the plaintiff was received, the transcript of the testimony taken at the hearing before the Board was made part of the record. In this action, the court entered judgment for the District.

wherein the transcript of the testimony heard by the Board was made a part of [394-3] the record, the court "dismissed" Mrs. Cerra's appeal. In its opinion the court ruled Mrs. Cerra's contract was properly terminated, both on the ground of incompetency and persistent and willful violation of the Board's regulation as to pregnancy.

Mrs. Cerra then filed an appeal in the Commonwealth Court which later affirmed the order of the Court of Common Pleas.³ Judges Mencer and Kramer filed dissenting opinions. See 3 Commonwealth Court 665, 285 A.2d 206 (1972). We granted allocatur and now reverse.

Under the Public School Code of Pennsylvania, *supra*, specifically, Art. V, §510, 24 P.S. §5-510, the board of school directors in any school district "may adopt and enforce such reasonable rules and regulations as it may deem necessary" regarding the conduct and deportment of all teachers during the time they are engaged in their duties to the district. However, under the Code, specifically, Section 1122, 24 P.S. §11-1122, a teacher's contract of employment may be terminated by the board only on certain specified grounds.⁴ Instantly, [394-4] the Board attempted to justify the termination of Mrs. Cerra's contract on two grounds, included in Section

³The majority opinion of the Commonwealth Court restricted its discussion to the legality and reasonableness of the Board's regulation requiring a teacher to resign in the event of pregnancy.

⁴Section 1122 of the Act of 1949, pertinently states in part:

"The only valid causes for termination of a contract heretofore or hereafter entered into with a professional employee shall be immorality, incompetency, intemperance, cruelty, persistent negligence, mental derangement, advocacy of or participation in un-American or subversive doctrines, persistent and wilful violation of the school laws of this Commonwealth on the part of the professional employee"

1122 of the Code, namely, incompetency and willful violation of its school laws, specifically, her refusal to resign because of pregnancy, as required by the Board's regulation. For the reasons that follow we conclude the action of the Board was contrary to law.

While "incompetency" is a valid reason for the termination of a professional employee's contract with a school district (see Section 1122 of the Act of 1949, *supra*) a physical disability which results only in a teacher's temporary absence from his or her duties is not such incompetence as the statute contemplates. Otherwise, a temporary absence from service for an appendectomy, for example, would be such incompetence as to justify the termination of a teacher's contract. The statute intended no such unrealistic meaning of "incompetency."

The finding of the Secretary that the instant record "fails to substantiate the charge of incompetency" was eminently correct. According to the uncontradicted testimony, Mrs. Cerra performed her teaching duties satisfactorily and continuously until May 22, 1970, when her services were suspended by the District's superintendent. This was twelve days prior to the end of the 1969-1970 school term. It is also undisputed in the record that as of September 1970, the beginning of the school term for 1970-1971, Mrs. Cerra was physically and mentally fit to resume her teaching duties. Even assuming during the month of May 1970, Mrs. Cerra "lacked . . . the physical fitness . . . to perform the required duties incident to her employment of teaching," this, in itself, is not "incompetency" under the Code.

The Court of Common Pleas in sustaining the Board's finding [394-5] of incompetency relied mainly on *Brown's Case*, 151 Pa. Superior Ct. 522, 30 A.2d 726

(1943), aff'd 347 Pa. 418, 32 A.2d 565 (1943). However, in *Brown* the dismissal was not because of pregnancy, but rather because the teacher "became incompetent (for an extended period) due to her physical incapacity to discharge her duties." The instant record fails to justify such a finding.

The issue of incompetency need not detain us further for it is abundantly clear from the record that the true reason for Mrs. Cerra's dismissal was her refusal to resign at the end of the fifth month of her pregnancy, as required by the Board's regulation. Hence, the real issue posed by their appeal is the legality of the Board's action in terminating Mrs. Cerra's contract for refusing to resign in accordance with this specific regulation. We have no hesitancy in reaching the conclusion that the Board's action was violative of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §955(a), and, therefore, was illegal. In view of this conclusion, it is unnecessary to determine if Mrs. Cerra's rights to Equal Protection and Due Process under the Fourteenth Amendment to the United States Constitution were also violated. But see and compare, *LaFleur v. Cleveland Board of Education*, 465 F.2d 1184 (6th Cir. 1972), and *Cohen v. Chesterfield County School Board*, 326 F. Supp. 1159 (E.D. Va. 1971), aff'd ____ F.2d ____ (4th Cir. 1972).⁵

[394-6] The Act of 1955, *supra*, forbids discrimination in employment on the basis of race, color, religious

⁵For a scholarly discussion of the constitutional problems involved, see also *Mandatory Maternity Leave of Absence Policies, An Equal Protection Analysis*, 45 Temple Law Quarterly, 240 (1972).

creed, ancestry, age, sex or national origin.⁶ School Districts are subject to the Act. See 43 P.S. §954(b).

As noted before, Mrs. Cerra's contract was terminated absolutely, solely because of pregnancy. She was not allowed to resume her duties after the pregnancy ended, even though she was physically and mentally competent. There was no evidence that the quality of her service as a teacher was or would be affected as a result of the pregnancy. Male teachers, who might well be temporarily disabled from a multitude of illnesses, have not and will not be so harshly treated. In short, Mrs. Cerra and other pregnant women are singled out and placed in a class to their disadvantage. They are discharged from their employment on the basis of a physical condition peculiar to their sex. This is sex discrimination pure and simple.

While it is true that Section 5 of the Act of 1955, *supra*, (43 P.S. §955) includes an exception to the proscriptions against discriminatory practices, when such practices are based on a bona fide occupational qualification, the record fails to substantiate such a bona fide qualification in this case. Cf. *Griggs v. Duke Power Company*, 401 U.S. 424, 91 S.Ct. 840 (1971); *Weeks v. Southern Bell*, 408 F.2d 228 (5th Cir. 1969); and *Bowe v. Colgate Palmolive*, 416 F.2d 711 (7th Cir. 1969).

⁶In relevant part, the Act of 1955 provides:

"It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification . . . (a) For any employer because of race, color, religious creed, ancestry, age, sex or national origin of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, . . ."

It is argued that the regulation involved is proper because it insures continuity in class-room instruction and alleviates burdensome administrative problems. But, these problems are not confined to pregnancy cases. They also flow from the absence from duty of any teacher suffering any temporary disability, even that disability incident to the common cold. Moreover, efficiency is not the only value to be considered. See *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208 (1972).

The orders of the courts below are reversed, and the record is remanded to the court of original jurisdiction with directions to proceed consonantly with this opinion.

Mr. Chief Justice Jones did not participate in the consideration or decision of this case.

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In The

Supreme Court of the United States

October Term, 1972

No. 72-1129

SUSAN COHEN,

Petitioner,

v.

CHESTERFIELD COUNTY SCHOOL BOARD
AND DR. ROBERT F. KELLY,

Respondents.

**BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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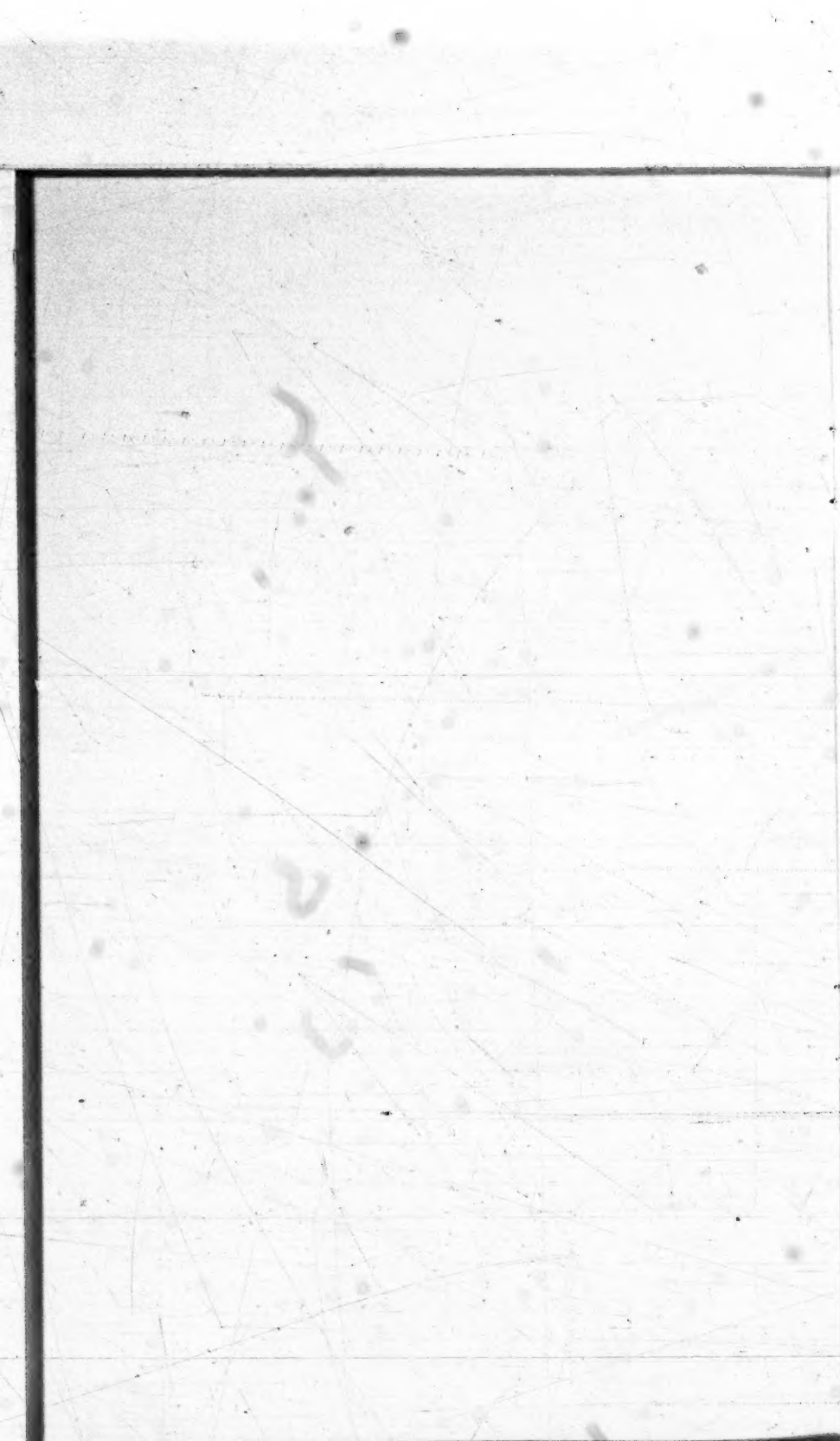


TABLE OF CONTENTS

	<i>Page</i>
CITATION TO OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
QUESTIONS PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT:	
1. The Decision Below Is In Harmony With Recent Decisions Of This Court	5
2. The Decision Below Does Not Involve An Important Question Of Federal Law Since The Equal Employment Opportunity Act Of 1972 Which Narrows The Holding In This Case Is Now Applicable To Public School Employment	6
3. The Decision Below To Grant A Rehearing Does Not Violate Petitioner's Right To Due Process	8
CONCLUSION	9

TABLE OF CITATIONS

Cases

Green v. Waterford Board of Education, F.2d (2nd Cir. 1973), decided Jan. 29, 1973	7
La Fleur v. Cleveland Board of Education, 465 F.2d 1184 (6th Cir. 1972), petition for cert. filed, 41 U.S.L.W. 3315 (Nov. 27, 1972)	7
Reed v. Reed, 404 U.S. 71 (1971)	5
Schattman v. Texas Employment Commission, 459 F.2d 32 (5th Cir. 1972) cert. denied, 41 U.S.L.W. 3372 (Jan. 8, 1973)	7

Constitution, Statutes and Rules

	<i>Page</i>
U.S. Const. Amend. XIV. Sec. 1	2
37 Fed. Reg. 6837	6
28 USC § 1254(1)	2
42 USC § 1983	3
29 C.F.R. 1604.10(b)	6
P. L. 92-261; 86 Stat. 103 (1972)	6
Rule 19, Rules of the United States Supreme Court	8
Rule 40, Federal Rules of Appellate Procedure	8

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**BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, sitting *en banc*, is unreported. (Pet. App. 14a). The opinion of the United States Court of Appeals for the Fourth Circuit initially affirming the judgment of the United States District Court for the Eastern District of Virginia, Richmond Division, is unreported. (Pet. App. 1a) The decision of the United States District Court for the Eastern District of Virginia, Alexandria Division, is reported at 326 F. Supp. 1159 (E.D. Va. 1971).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on September 14, 1972. On September 20, 1972, respondents filed their Petition for Rehearing and Suggestion for rehearing *en banc*, which Petition and Suggestion was granted on January 2, 1973. The judgment of the United States Court of Appeals for the Fourth Circuit, *en banc*, was entered on January 15, 1973. The petition for a writ of certiorari was filed on February 15, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV, Sec. 1

"... , [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED FOR REVIEW

Is the Chesterfield County School Board's regulation requiring pregnant teachers to make themselves available for a leave of absence after the fifth month of pregnancy so devoid of any reasonable basis that it violates the equal protection clause of the Fourteenth Amendment to the United States Constitution?

Did the United States Court of Appeals for the Fourth Circuit violate petitioner's rights under the due process clause of the Fourteenth Amendment by accepting a Suggestion for Rehearing, *en banc*, and granting a Petition for Rehearing without requesting petitioner to file briefs and present arguments in opposition?

STATEMENT OF THE CASE

This is a case brought under the Civil Rights Act of 1871 (42 U.S.C. § 1983). The plaintiff, formerly employed as a public school teacher by the School Board of Chesterfield County, Virginia, complains that a school board regulation requiring her to be available for a leave of absence at the end of her fifth month of pregnancy discriminates against her as a woman, and thereby deprives her of equal protection of the laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

Plaintiff was employed as a school teacher by the defendant School Board for the 1970-71 school year under an employment contract as required by law. That contract provides, in part, that "The said party of the second part [the plaintiff] shall comply with all school laws, State Board of Education regulations, and all rules and regulations made by the party of the first part [the defendant School Board] in accordance with the law and State Board of Education regulations. . . ."

The plaintiff challenges the constitutionality of the defendant School Board's maternity leave regulation, which provides, in pertinent part, as follows:

"a. Notice in writing must be given to the School Board at least six (6) months prior to the date of expected birth.

"b. Termination of employment of an expectant mother shall become effective at least four (4) months prior to the expected birth of the child. Termination of employment may be extended if the superintendent receives written recommendations from the expectant mother's physician and her principal, and if the superintendent feels that an extension will be in the best interest of the pupils and school involved."

The rule further provides that upon termination of employment a pregnant teacher goes on maternity leave and continues to enjoy personal benefits during such leave and has a guarantee of re-employment.

On or about November 2, 1970, the plaintiff notified the defendant School Board in writing that she was pregnant. She stated that her estimated date of delivery was April 28, 1971, and, with the consent of her obstetrician, requested that she be given maternity leave effective April 1, 1971.

Her request was denied, and maternity leave was granted effective December 18, 1970, the day before Christmas vacation pursuant to the maternity leave regulation.

On November 25, 1970, the plaintiff personally appeared before the defendant School Board and requested an extension of her maternity leave date from December 18, 1970 to January 22, 1971. This was denied. The basis for denial was that the defendant School Board had a replacement teacher available for hire.

Various reasons were assigned for the existence of the maternity leave regulation. According to defendant Robert F. Kelly, the Division Superintendent of the Chesterfield County, Virginia, school system, the main reason for the maternity leave regulation is to foster "continuity of teaching" by giving the School Board advance notice upon which it can program its need for and secure replacement teachers in an orderly fashion.

He also indicated that the maternity leave regulation is based upon a concern for absenteeism of pregnant school teachers, for the safety of the school children in emergency situations, such as fire, and for the safety of the unborn fetus and the expectant mother as a result of the exposure to pushing by students in the school halls and classrooms. Similar expressions, although varying in emphasis, were

made by the chairman and members of the defendant School Board.

The expert medical evidence was that pregnancy alone does not incapacitate a school teacher after the fifth month of her pregnancy, and that no incapacitating medical disorders are certain to occur after the fifth month of pregnancy. It was conceded, however, that no two pregnancies are alike, and that certain incapacitating medical disorders peculiar to pregnancy could occur after the fifth month of pregnancy. The United States Court of Appeals for the Fourth Circuit, sitting *en banc*, recognized the School Board's reasons for the regulation and upheld it "... as contributing to the better education of the pupils by enabling school officials to arrange a larger degree of continuity in their education." (Pet. App. 22a)

REASONS FOR DENYING THE WRIT

1. The Decision Below Is In Harmony With Recent Decisions Of This Court.

In *Reed v. Reed*, 404 U.S. 71 (1971), this Court struck down an Idaho statute which gave preference to men in Probate Court appointments. This Court held the statute was purely arbitrary and unreasonable. However, this Court adopted the standard of reasonableness as that by which statutory sex classification should be judged for Fourteenth Amendment purposes. This Court said:

"A Classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' " 404 U.S. 71, 76.

In applying that test in this case the Fourth Circuit found simply that the regulation is reasonable and that it serves a

reasonable objective. It allows the school officials to plan for and make specific commitments to replacement teachers, and to avoid disruptions which would occur without such a rule. The decision below involves the application of the reasonableness test to a particular regulation, and the conclusion which the court derives from a particular factual context. It does not involve an important question of federal law which warrants consideration by the Supreme Court of the United States.

2. The Decision Below Does Not Involve An Important Question Of Federal Law Since The Equal Employment Opportunity Act Of 1972 Which Narrows The Holding In This Case Is Now Applicable To Public School Employment.

After the institution of this suit the Equal Employment Opportunity Act of 1972, P.L. 92-261, as amended, was made applicable to public school employment. §§ 701 and 702 of P.L. 92-261. The Equal Employment Opportunity Commission has issued new rules containing "guidelines" on mandatory maternity leaves. 37 Fed. Reg. 6837. These guidelines make it a *prima facie* violation of Title VII for an employer to exclude employees "from employment . . . because of pregnancies . . ." 29 C.F.R. 1604.10(b). (Pet. App. 28a). Accordingly, any case involving maternity provisions applicable to public school employees will now be decided under the Equal Employment Opportunity Act and not under the equal protection clause of the Fourteenth Amendment.

A decision by the United States Supreme Court in this case would have little precedential value. Should this Court reverse the decision of the Fourth Circuit Court of Appeals, only the rights of petitioner under the equal protection clause of the Fourteenth Amendment would be determined.

The rights of other teachers under the maternity leave policy would be decided under Title VII of the Civil Rights Act. Therefore, this case no longer presents an important federal question.

This argument of insubstantial federal question applies with equal force to the apparent conflict in circuits created by this decision and *Schattman v. Texas Employment Commission*, 459 F.2d 32 (5th Cir. 1972) cert. denied, 41 U.S.L.W. 3372 (Jan. 8, 1973), both sustaining maternity leave provisions, and *La Fleur v. Cleveland Board of Education*, 465 F.2d 1184 (6th Cir. 1972), pet. for cert. filed Nov. 26, 1972, and *Green v. Waterford Board of Education*, unreported (2nd Cir., decided January 23, 1973), both holding maternity provision violative of the equal protection clause of the Fourteenth Amendment. It should also be pointed out that this conflict in circuits is more apparent than real, since each case involves an analysis of a maternity leave regulation which is different in scope and application. The regulation in *Cohen* is far more justifiable in that it alone permits a flexible application—it allows the school board to extend the duration of employment of a pregnant teacher when to do so will contribute to the continuity of education in the classroom. On the other hand, the regulations in *Schattman*, *Green* and *La Fleur* allow no such extension. (The regulation in *Schattman* provides "No employee anticipating maternity confinement may remain in active service with the commission later than two months before the expected delivery date." The regulation in *Green* requires a pregnant teacher to take a leave of absence "not less than four months prior to expected confinement or at such earlier time as a replacement becomes available." The regulation in *La Fleur* requires a pregnant teacher to take a leave of absence "not less than five (5) months before the expected date of the normal birth of the child. Application of

such leave shall be forwarded to the Superintendent at least two (2) weeks before the effective date of the leave of absence.") In addition, the variation in application and scope of these regulations affects a determination of their justification under the reasonableness test.

In the petition for certiorari filed in this case, petitioner has attempted to reargue the merits of the case and has asserted the merits argument as a basis for granting certiorari. Petitioner has failed to point to any substantial reason justifying a review on certiorari as set forth in Rule 19 of the Rules of the United States Supreme Court.

3. The Decision Below To Grant A Rehearing Does Not Violate Petitioner's Right To Due Process.

The petitioner has created a new issue in its petition for certiorari by alleging that the United States Court of Appeals for the Fourth Circuit violated petitioner's constitutionally guaranteed right to due process by granting a rehearing *en banc* without allowing counsel for petitioner the opportunity to file a brief and make oral argument in opposition. Rule 40 of the Federal Rules of Appellate Procedure provides:

No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

The rule clearly provides for the procedure utilized by the Court in this case, and an attempt by petitioner to denomi-

nate the Court's exercise of discretion as a violation of petitioner's constitutionally guaranteed right to due process is wholly without merit. Moreover, this groundless criticism of the Court should be given no consideration when reviewing this petition for certiorari.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-777

**CLEVELAND BOARD OF EDUCATION,
et al.,**

Petitioners,

-v.-

**JO CAROL LA FLEUR,
et al.,**

Respondents.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT**

BRIEF FOR PETITIONERS

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**PETITION FOR A WRIT OF CERTIORARI FILED
NOVEMBER 27, 1972
CERTIORARI GRANTED APRIL 23, 1973**

TABLE OF CONTENTS

	<u>Page</u>
Citation to Opinions Below	1
Jurisdiction	1
Constitutional Provision Involved	2
Questions Presented for Review	2
Statement of the Case	3
A.—The Challenged Rule	3
B.—The Environment In Which the Rule Is Applied	5
C.—The Medical Evidence Established, Without Dispute, That a Pregnant School Teacher Is Not As Able-Bodied As a Non-Pregnant School Teacher	7
D.—The Undisputed Evidence Established The Administrative Necessity for the Rule	11
Summary of Argument	13
Argument	14
I. The Mandatory Leave Policy of the Cleveland Board Does Not Infringe on Any Fundamental Constitutional Right	14
II. Respondents Have Not Been Deprived of the Equal Protection of Laws	17
A. <i>Rodriguez</i> Supports the Traditional Standard of Review in Equal Protection Cases Involving Local Educational Policy	17
B. The Local Educational Policy Promulgated by the School Board Regulation in the Case at Bar Fulfills a Legitimate State Objective in a Rational Way	19

C. The Opinion of Mr. Justice Brennan in <i>Frontiero</i> Does Not Apply in the Circumstances of This Case to Require an Uncritical and Unqualified Application of the Suspect Classification Cri- terion	21
D. The Challenged Maternity Rule Is An Example of Local Initiative and Local Control Over Educational Policies	29
E. Precedent Unqualifiedly Supports the Position that A Classification Based on Sex Should be Tested By the Traditional Standard of Review	31
F. Even Tested By The Suspect Classification Standard, the Challenged Regulation in the Case at Bar Does Not Violate the Equal Protec- tion Clause	38
Conclusion	40
Exhibit A: Catalogue and Bibliography of Disorders, Dis- comforts and Complications of Pregnancy	41

TABLE OF AUTHORITIES

Cases

	<u>Page</u>
<i>American Newspaper Publishers Association v. Alexander</i> , 294 F. Supp. 1100 (D.D.C. 1968)	28
<i>Board of Regents v. Roth</i> , 408 U.S. 564 (1972) .. 15, 16, 27,	39
<i>Breedlove v. Suttles</i> , 302 U.S. 277 (1937)	32
<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954) ...	30
<i>Buckley v. Coyle Public School System</i> , 476 F. 2d 92 (10th Cir. 1973)	34, 37
<i>Cerra v. East Stroudsburg Area School District</i> , Pa., 299 A. 2d 277 (1973)	38
<i>Cohen v. Chesterfield County School District</i> , 474 F. 2d 395 (4th Cir. 1973)	34, 37, 38
<i>Dobbins v. Local 212 International Bro. Elec. Workers</i> , 292 F. Supp. 413 (S.D. Ohio 1968)	28
<i>Eisenstadt v. Baird</i> , 405 U.S. 438 (1972)	22, 23, 26
<i>Epperson v. Arkansas</i> , 393 U.S. 97 (1968)	29
<i>Espinoza v. Farah Mfg. Co.</i> , 462 F. 2d 1331 (6th Cir. 1972)	29
<i>Frontiero v. Richardson</i> , 93 S. Ct. 1764 (1973) ... 2, 3, 14, 15, 21, 22, 23, 27, 29, 31	
<i>Goesaert v. Cleary</i> , 335 U.S. 464 (1948)	24, 25, 31, 32
<i>Green v. Waterford Board of Education</i> , 473 F. 2d 629 (2nd Cir. 1973)	34, 35, 36, 37
<i>Griggs v. Duke Power Co.</i> 401 U.S. 424 (1971) .. 27, 28, 29	
<i>Griswold v. Connecticut</i> , 381 U.S. 479 (1965)	26
<i>Holroyd v. Eibling</i> , 116 Ohio App. 440 (Franklin County Ct. App.), appeal dismissed, 174 Ohio St. 27 (1962)	31
<i>Hoyt v. Florida</i> , 368 U.S. 57 (1961)	32

	<u>Page</u>
<i>Muller v. Oregon</i> , 208 U.S. 412 (1908)	8, 32
<i>Orr v. Trinter</i> , 444 F. 2d 128 (6th Cir. 1971); cert. denied, 408 U.S. 943 (1972), rehearing denied U.S.	16
<i>Patrone v. Howland Local Schools Board of Educa- tion</i> , 472 F. 2d 159 (6th Cir. 1972)	16
<i>Perry v. Sindermann</i> , 402 U.S. 593 (1972)	15, 16, 39
<i>Pickering v. Board of Education</i> , 391 U.S. 563 (1968) ..	15
<i>Police Department v. Mosley</i> , 408 U.S. 92 (1972)	35
<i>Radice v. New York</i> , 264 U.S. 292 (1924)	33
<i>Reed v. Reed</i> , 404 U.S. 71 (1971)	21, 22, 29, 31, 34, 38
<i>Roe v. Wade</i> , 93 S. Ct. 705 (1973)	20, 26
<i>Sail'er Inn, Inc. v. Kirby</i> , 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971)	24, 25
<i>San Antonio Independent School District v. Rodriguez</i> , 93 S. Ct. 1273 (1973)	2, 3, 13, 15, 17, 18, 19, 25, 29, 30, 39
<i>Schattman v. Texas Employment Commission</i> , 459 F. 2d 32 (5th Cir. 1972), cert. denied, 93 S. Ct. 901 (1973)	34, 37, 38
<i>Schlesinger v. Wisconsin</i> , 270 U.S. 230 (1925)	21
<i>Serrano v. Priest</i> , 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601, (1971)	25
<i>Struck v. Secretary of Defense</i> , 460 F. 2d 1372 (9th Cir. 1971)	34, 37, 38
<i>Weber v. Aetna Casualty and Surety Co.</i> , 406 U.S. 164 (1972)	35
<i>West Coast Hotel v. Parrish</i> , 300 U.S. 379 (1937)	25

	<u>Page</u>
<i>Williams v. McNair</i> , 316 F. Supp. 134 (D.S. Car. 1970), aff'd on appeal, 401 U.S. 951 (1971)	33
<i>Wright v. Council of the City of Emporia</i> , 407 U.S. 451 (1972)	30

Constitutions

U.S. Const. amend. XIV, § 1	5
Ohio Const. art. VI, § 3; art. I, § 7	30

Statutes

28 U.S.C. § 1343(3) and (4) (1970)	4
29 U.S.C. § 206(d) (1970)	27
42 U.S.C. § 1983 (1970)	4
42 U.S.C. § 2000e(a), (b) and 2000e-1 (1972)	27
42 U.S.C. § 2000e-2(a), (b), (c) (1970)	27
42 U.S.C. § 2000e-12(a)	28
42 U.S.C. § 2000e-12(b)(1) (1964)	28
Equal Rights Amendment to the Constitution, of March 22, 1972, H. J. Res. No. 208, 92d Cong., 2d. Sess. (1972)	27
Ohio Rev. Code;	
§ 3313.47	30
§ 3313.20	30
§ 3319.13	30, 37
§ 3319.16	31
Penn. Human Rel. Act, 43 P.S. § 955(a) (1955)	38

Rules

	<u>Page</u>
U.S. Sup. Ct. Rule 40 1(d)	2
Fed. R. Civ. P. 52	5, 13
29 C.F.R. Part 1601 (1972)	28
29 C.F.R. Part 1604 (1972)	28
29 C.F.R. § 1604.10(b) (1972)	27

MISCELLANEOUS

Brown, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," 80 <i>Yale L.J.</i> 871 (1971)	34
O. W. Holmes, <i>Collected Legal Papers</i> (1921)	20
Note, "Developments in the Law—Equal Protection," 82 <i>Harv. L.Rev.</i> 1065 (1969)	25

In The
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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONERS

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported in 465 F.2d. 1184. The opinion of the District Court is reported in 326 F. Supp. 1208 (N.D. Ohio-1971). Both opinions are reproduced in the Appendix to the Petition for a Writ of Certiorari.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was rendered and filed on July 27, 1972. A motion for a rehearing and suggestion for a hearing *en banc* was denied on August 29, 1972. The Petition for a Writ of Certiorari was filed November 27, 1972 and granted April 23, 1973. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved is U.S. CONST. amend. XIV. § 1

" . . . ; nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED FOR REVIEW**I**

Mindful of Rule 40 1(d) of the rules of this Court, petitioners do not now ask to raise additional questions or change the substance of the question already presented in the Petition for Certiorari, but it is crucial to point out that since the Petition for Certiorari was filed in this case, two decisions have been rendered by this Court which bear upon the issue here. These are *San Antonio Independent School District v. Rodriguez*, 93 S. Ct. 1273 (1973), decided March 23, 1973, and *Frontiero v. Richardson*, 93 S. Ct. 1764 (1973), decided May 14, 1973.

Rodriguez holds that in determining the constitutionality of challenged state classification in the field of educational policy the traditional standard of review under the equal protection clause of the Fourteenth Amendment shall be applied, viz.—does that classification bear a rational relationship, in both its object and the means of its execution, to a legitimate state purpose?

While *Frontiero* rests on no majority opinion, four of the justices of this Court there agreed that a challenged federal classification based upon sex alone was inherently suspect, hence its constitutional validity (under the Fifth Amendment equivalent of Fourteenth Amendment Equal Protection) must be judged, not by the traditional standard applied in *Rodriguez*, but by the doctrine of strict judicial

scrutiny heretofore reserved to classifications based on race, national origin, alienage, indigency, or illegitimacy.

The case at bar presents to this Court a classification which the Court of Appeals treated as based on sex alone, as in *Frontiero*, but in a *Rodriguez* situation. The question in this case is whether, in determining the constitutionality of a challenged state classification in the field of educational policy, *viz.*—a mandatory maternity leave regulation for pregnant school teachers, should this Court apply the *Rodriguez*-approved traditional standard of review under the Equal Protection Clause or does *Frontiero* demand strict judicial scrutiny? A related question is whether a classification that is limited in its application to pregnant female school teachers is based on sex alone or is based on the condition of pregnancy alone.

II

Implicit in the above are the further questions of whether the challenged state classification satisfies the *Rodriguez* criterion of traditional review, if it be so applied, or, if that be deemed by this Court not the applicable standard, whether the classification based on the record here under review satisfies *Frontiero's* strict judicial scrutiny, since here, unlike the position of the school board in *Rodriguez* before this Court, petitioners contend that the challenged state classification satisfies either or both criteria.

STATEMENT OF THE CASE

A. The Challenged Rule

Respondents, at the time of filing their complaints, were two married pregnant school teachers. They complained of a rule of the Cleveland School Board which required them to take a mandatory maternity leave at the

beginning of their fifth month of pregnancy and not return until the first semester following the birth of their babies.¹ The complaints asserted that the Cleveland School Board rule violated complainants' constitutional and statutory civil rights. Jurisdiction of the District Court was asserted under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970), 28 U.S.C. § 1343(3) and (4) (1970) and the

¹ The rule, in its entirety, reads as follows:

"Any married teacher who becomes pregnant and who desires to return to the employ of the Board at a future date may be granted a maternity leave of absence without pay.

"APPLICATION. A maternity leave of absence shall be effective not less than *five (5) months before the expected date* of the normal birth of the child. Application for such leave shall be forwarded to the Superintendent at least *two (2) weeks before the effective date of the leave of absence*. A leave of absence without pay shall be granted by the Superintendent for a period not to exceed *two (2) years*.

"REASSIGNMENT. A teacher may return to service from maternity leaves not earlier than the *beginning of the regular school semester which follows the child's age of three (3) months*. In unusual circumstances, exceptions to this requirement may be made by the Superintendent with the approval of the Board. *Written* request for return to service from maternity leave must reach the Superintendent at least six (6) weeks prior to the beginning of the semester when the teacher expects to resume teaching and shall be accompanied by a doctor's certificate stating the health and physical condition of the teacher. The Superintendent may require an additional physical examination.

"When a teacher qualifies to return from maternity leave, she shall have priority in reassignment to a vacancy for which she is qualified under her certificate, but she shall not have prior claim to the exact position she held before the leave of absence became effective.

"A teacher's failure to follow the above rules for maternity leave of absence shall be construed as termination of contract or as grounds for dismissal." (emphasis in original) (A. 54-55).

Equal Protection Clause of the Fourteenth Amendment. The two cases were tried together.

After a full hearing, the District Court found that there was "a reasonable basis for the rule", and that respondents had not shown that the rule was arbitrary or unreasonable. At no time since have respondents contended that the findings of fact of the District Court were "clearly erroneous" within the meaning of Rule 52 of the Rules of Civil Procedure.

B. The Environment In Which The Rule Is Applied

The evidence before the court showed that the rule was some twenty years old. (A. 55, 187). While its origins were somewhat obscure (A. 187-188), it was clear, under the evidence, that it had continued to be enforced because of the felt necessity of having able-bodied teachers presiding over classrooms. (A. 207, 215, 133, 189-190, 152). Children today, nurtured, as the evidence shows, by the violence of television programs and their reactions to the world around them (A. 152), must be taught by able-bodied, vigorous teachers. (A. 207, 210-212). The medical evidence of the defendant Board established that a pregnant school teacher, after four months of pregnancy, is not the able-bodied person that she was before. (A. 126-130). She cannot cope with the daily problems of teaching in a great urban school system as well as she could before her pregnancy. (A. 130). Her weight increases 15 or 20 pounds, her center of gravity shifts, she must urinate more frequently, she experiences the three classic fears of pregnancy—miscarriage, agony in labor, and a deformed child. (A. 129-130). Her pregnancy in the environment in which she finds herself, full of active, demanding, disrespectful and, indeed, sometimes jeering young people (A. 188), affects her ability to teach. (A. 130, 188). Putting aside the effect of the disorders, discomforts, and complications of pregnancy *upon her* as not relevant to the issues in

this case, those disorders, discomforts and complications affect, according to the expert evidence in this case, *her ability to perform her teaching tasks*. (A. 130-134). She is no longer able-bodied *in the classroom*. (A. 128, 132-133). The evidence on these points is substantially uncontradicted, even by the obstetrician of one of the plaintiffs. (A. 113).

This is not to say, nor does the evidence attempt to establish, that the environment of today's teacher in a great urban school system in America is as dismal as that portrayed in the *Blackboard Jungle*, but the environment demands a healthy, active, able-bodied person. For example, the evidence showed that during the school year 1969-1970 there were 256 assaults by students on Cleveland teachers, or more than one every school day. (A. 207). Forty-six guns and eighteen knives were confiscated from students in the Cleveland school system during the academic year 1970-1971 (A. 208), and 136 teachers were injured in school accidents in 1969. (A. 210). Forty-one of those accidents were falls. (A. 210). The plaintiffs in the case at bar admitted to witnessing fights both within and without their classrooms during their limited teaching experience. (A. 71-72, 92, 93). In addition to being on their feet in the classrooms, teachers are required to maintain order in hallways, recreation areas, cafeterias, and study halls. (A. 211).

A pregnant teacher is not an unusual phenomenon in the Cleveland School System. While the Cleveland Board of Education employs some 5,859 teachers, 64 per cent of them are female and 50 per cent of the females are of child-bearing age. (A. 209). Approximately 255 teachers are on maternity leave of absence at any given moment in the school year. (A. 231).

Plaintiff Nelson testified that she had had between three and four student fights in her classroom in the seven months she had been teaching. (A. 71-72). Plaintiff La-

Fleur admitted to "problems of discipline" at her junior high school in the city. (A. 93). Mrs. Nelson admitted that four teachers in her junior high school had been assaulted in that year alone. (A. 72). A distinguished woman psychologist, Dr. Jane Kessler, called to testify on behalf of plaintiffs, confirmed on cross-examination that the incidence of violence is increasing in today's schools and that the classroom today is a more dangerous place for the teacher than it was ten years ago. (A. 153).

C. The Medical Evidence Established, Without Dispute, That a Pregnant School Teacher Is Not as Able-Bodied As a Non-Pregnant School Teacher.

The medical testimony upon which the defendant Board relied was largely that of William C. Weir. A Harvard Medical School graduate and a member of the faculty of Obstetrics and Gynecology at the Case Western Reserve University Medical School for 35 years, Dr. Weir is one of Cleveland's most distinguished obstetricians. (A. 120,122). In addition to numerous publications and medical papers in the field of pregnancy, he is a founding fellow of the American College of Obstetrics and Gynecology, a diplomate of the American Board of Obstetrics and Gynecology, and for 20 years Chief Gynecological Consultant of the Maternal Health Association's Infertility Clinic in Cleveland. (A. 123, 124).

Dr. Weir, who has delivered some 4,000 children in 20 years of active obstetrical practice (A. 123), testified that the incidence of fetal loss, by miscarriage or spontaneous abortion, ranged as high as 13-20 per cent in all pregnancies and that only 60-70 per cent of pregnancies can be considered "entirely normal" (A. 135). Against this background of potential fetal loss under normal circumstances, Dr. Weir testified that placing the pregnant mother in an environment conducive to physical accident or vio-

lence, or even fear of violence, could not help but have a deleterious effect on the chances for a normal pregnancy. (A. 134).

Dr. Weir also testified that the psychological effect of pregnancy upon all mothers predictably gives rise to three classic fears: fear of miscarriage, fear of difficulty in labor, and fear of abnormalities in the child (A. 129). He stated that the wholly understandable, protective "fears" of the pregnant teacher would further inhibit her in an environment with potential for violence, and, for this reason, the pregnant teacher "would not be able to fulfill her duties as well as if she were not pregnant." (A. 130).

Medical complications which can be expected with each stage of pregnancy were detailed at length by Dr. Weir.² He testified that obstetrical practice is to divide the nine-month period of pregnancy into three "trimesters," the first trimester covering months one through three of pregnancy, the second trimester, months four through six, and the third, months seven through nine (A. 124-127). Complications of the second trimester include spontaneous labor and prematurity, toxemia of pregnancy (with resultant high blood pressure or convulsions), partial placenta previa and complete placenta previa (A. 126-127). Toxemia of pregnancy, a major cause of maternal and fetal deaths, can develop "very suddenly" (A. 138); its incidence varies between the socio-economic groups, with instances as high as 10 per cent noted in one Cleveland hospital (A. 126). Partial or complete placenta previa, where portions of the placenta cover the lower opening of the cervix resulting in

² To demonstrate, in the manner of Mr. Justice Brandeis while yet a barrister before this Court (see *Muller vs. Oregon*, 208 U.S. 412, 419-421), that Dr. Weir's testimony represents the consensus of medical expertise, a "Catalogue and Bibliography of Disorders, Discomforts and Complications of Pregnancy" is appended following the Conclusion of this brief as Exhibit A.

hemorrhaging, a very serious medical complication which can result in death, occurs in one to two per cent of the population (A. 127).

The complications of the third trimester of pregnancy were detailed by Dr. Weir (A. 127-129). During this time the normally pregnant woman has gained from 15 to 20 pounds (A. 124). Her mobility is considerably reduced (A. 128). Her whole center of gravity changes, her shoulders are further back and she is subject to more back-aches, and due to the weight increase she is much more awkward and cannot move around as quickly as she could before (A. 128). Because of the increase in the size of the fetus, there is an increased pressure on the bladder and the frequency of urination increases (A. 128). The possibilities of a premature baby occurring spontaneously increase (A. 128). Problems of toxemia of pregnancy and placenta previa become more acute in the third trimester. (A. 128).

Fears of assault while in the performance of her duties would prevent the expectant mother from fulfilling her duties as well as if she were not pregnant (A. 130). Any sudden violent physical exertion can cause a premature separation of the placenta (A. 130); even a shoving or pushing of a teacher in the third trimester of pregnancy could cause a premature separation of the placenta (A. 131).

Dr. Weir testified that medical science itself makes a distinction about the time when the Cleveland maternity leave rule goes into effect (beginning of fifth month); medically and legally, loss of the fetus before the end of the fifth month is termed a "miscarriage," but fetal loss after the end of the fifth month is a "still birth," requiring doctor's certification (A. 125).

Dr. Weir testified that in his opinion, based upon his varied experience and expertise in obstetrics, the Cleveland regulation requiring maternity leave from five months

before the expected date of birth to the start of the regular school semester following the child's age of three months, particularly in view of the teacher-assault statistics, was "a very reasonable rule" (A. 133). He stated that "certainly as pregnancy goes along the chance of injury and the increased worries I feel would increase the complications of pregnancy to a certain extent." (A. 134).

On cross-examination, asked if he would advise a patient teaching at a Cleveland inner-city school to stop working, Dr. Weir testified "under the present circumstances I think it would probably be a wise idea to tell them they are taking increased chances" (A. 136).

Plaintiffs offered no evidence to rebut this testimony on the effects of pregnancy, especially in the inner-city school environment. Indeed, Plaintiff Nelson's doctor admitted, on cross-examination, that certain medical problems occur in normal pregnant women having normal pregnancies (A. 111). He admitted that these problems (a) include weight gains of 15 to 20 pounds (A. 111), (b) shifts in the center of gravity (A. 111), (c) increase in the frequency of urination (A. 111-112), (d) require a high protein diet (A. 112), and (e) impair the pregnant teacher's ability to engage in physical activity (A. 113). Plaintiff's obstetrician also confirmed the seriousness of placenta previa and toxemia of pregnancy and admitted that placenta previa could be induced by sudden quick physical exertion. (A. 113).

Plaintiffs introduced, by deposition, the testimony of a second obstetrician who conceded that in her own hospital pregnant nurses, by unwritten rule, usually took leave "about the seventh month" or "sooner, depending on the doctor" (even in a situation where full hospital emergency facilities were available instantly to them) (A. 176). The doctor testified that she advised people to continue working on an individual basis, while allowing that strenuous or sudden physical exertion could have an

effect on pregnancy (A. 176) and that her knowledge of conditions in the Cleveland schools was nil (A. 175-176).

D. The Undisputed Evidence Established The Administrative Necessity for The Rule.

The origin of the mandatory maternity leave rule was explained by Dr. Mark C. Schinnerer, who was Superintendent of the Cleveland City School District at the time of the rule's adoption in 1952 (A. 184). Dr. Schinnerer was an administrator for the Cleveland schools from 1923 until his retirement in 1961, and for 14 years its Superintendent (A. 184). Thereafter he served three terms in the Ohio House of Representatives, was Chairman of the House Education Committee, served as special consultant to the United States Office of Education and the New York City and Los Angeles school systems, and is a past chairman of the United States Conference of Large City School Superintendents (A. 182-85).

Dr. Schinnerer testified that he recommended the rule to the Board of Education for several reasons. Prior to the rule a patchwork, inconsistent practice prevailed whereby some teachers agreed to take maternity leave and some did not (A. 194). Some teachers took decided advantage of the lack of a rule and came "awfully close a few times" to having a child "born in the classroom" (A. 196). In addition, "very embarrassing situations" had developed where pregnant teachers had been "subjected to humiliations, indignities on the part of pupils," which were "disruptive of the classroom" (A. 188) and resulted in "consequent interruption, interference with the classroom activity" (A. 192).

Based on his extensive experience in the field of education, Dr. Schinnerer testified that in his opinion the mandatory maternity leave was a "good rule" because "it protects the continuity of the classroom program" (A. 189), as well as the teachers.

The continued administrative validity and necessity of the rule was underscored by Defendant Julius Tanczos, Jr., Supervisor of Organization for the Cleveland secondary schools. Mr. Tanczos had served the Cleveland schools as a teacher and administrator for 21 years, and was the key administrative official responsible for teacher staffing in Cleveland junior and senior high schools (A. 206).

Based on his experience as a teacher and an educational administrator, and based upon his day-to-day responsibility for administering a workable teaching program for Cleveland children, Mr. Tanczos stated that it was his opinion that not only was the rule a good rule, but that it was "necessary for the effective operation" of the school system (A. 216).

Mr. Tanczos testified as to the documented evidence of teacher assaults (A. 207) and teachers accidents (A. 210), the general duties of all school teachers, which include maintaining order in hallway, recreation and food areas (A. 211), being "on his or her feet for six periods of a school day" (A. 227), and the administrative problems "in the identification of a replacement for the teacher" absent adequate notice *and* a firm cut-off date (A. 213).

Respondents' evidence at trial did not dispute the testimony of exposure to physical trauma, duties of the teacher, or the administrative need for a uniform rule regarding teachers' termination of their duties for maternity reasons. Rather, the thrust of respondents' evidence was solely that the point during pregnancy at which each teacher relinquishes her teaching duties should be determined on an individual or case-by-case basis, and that this variable cut-off date for each of the hundreds of teachers pregnant at any one time in the Cleveland school system should be determined solely by her, and her private obstetrician, without reference to the well-being of the students or the duty of the school system to teach its pupils in the most effective manner.

SUMMARY OF ARGUMENT

On the undisputed evidence before this Court, the challenged maternity leave policy of the Cleveland Board of Education has not deprived plaintiffs of either a "fundamental" Constitutional right nor the Equal Protection of Laws under the Fourteenth Amendment.

That evidence establishes that after the fourth month of her pregnancy a pregnant school teacher is not as able-bodied in the classroom as she was before. She cannot perform the physical tasks which she is required to perform with the same degree of mobility and freedom from physical disability that she could before her pregnancy. She is overweight and physically unbalanced. She needs to urinate more frequently. She has an increased risk of serious physical disability. She is more susceptible to the assaults of children and the risk of falling. She has certain classic fears which are exacerbated by the environment in which she finds herself. Not only is she no longer physically as capable as she was, but the uncertainty of her status affects the administrative efficiency of the school's operation.

These facts are before this Court on this record. They involve neither speculation nor conjecture. The findings of the District Court have not been attacked as "clearly erroneous" under Rule 52 of the Rules of Civil Procedure and obviously could not be.

The challenged regulation is a legitimate effort to maintain able-bodied teachers in an environment where they are needed and the means chosen are consistent with Equal Protection.

The constitutional validity of the regulation should be judged by the traditional standard of judicial review most recently followed by this Court in *Rodriguez*, 93 S. Ct. 1273 (1973).

Local control of educational policy is a legitimate objective achieved by the challenged regulation.

It is the nature of the judicial process in our common law country to apply the law to the facts as the facts are presented to the Court. The facts in this case describe in substantially undisputed detail the environment of a great metropolitan school system wherein the felt need for able-bodied teachers has brought about the challenged regulation. The facts in this case are largely undisputed and were presented in open court and subjected to rigorous cross examination. The challenged maternity leave rule is desirable for the school system and fulfills a useful administrative requirement of continuity in the educational process. For a limited period of time, it deprives pregnant teachers of income, but only temporarily, and only as a result of a physical condition which they have voluntarily assumed. There is nothing invidious, there is nothing totally arbitrary about this case. There is nothing about the mandatory maternity leave regulation on this record which arbitrarily deprives a healthy, active, able-bodied teacher of a few months' salary.

The suspect classification adopted by four justices of this Court in *Frontiero*, 93 S. Ct. 1764 (1973), is, even if it were to be adopted as the majority view of this Court, inapplicable to the case at bar because *Frontiero* recognizes physical disability as a non-suspect classification.

Lastly, even if this case were to be judged by the strict judicial scrutiny applied by the four justices in *Frontiero*, the Board's regulations should be upheld.

The decision of the Court of Appeals should be reversed and the judgment of the District Court reinstated.

ARGUMENT

I. THE MANDATORY LEAVE POLICY OF THE CLEVELAND BOARD DOES NOT INFRINGE ON ANY FUNDAMENTAL CONSTITUTIONAL RIGHT.

One of the requirements for the application of the "strict standard of judicial review" is whether the chal-

lenged state classification "impermissibly interferes with the exercise of a 'fundamental' right and that accordingly the prior decisions of this [Supreme] Court require the application of the strict standard of judicial review," *Rodriguez*, 93 S. Ct. at 1294. The requirement is also stated in the concurring opinion of Mr. Justice Stewart,

"Moreover, quite apart from the Equal Protection Clause, a state law that impinges upon a substantive right or liberty created or conferred by the Constitution is, of course, presumptively invalid, whether or not the law's purpose or effect is to create any classification." 93 S. Ct. at 1311.

Nowhere in his opinion in *Frontiero* does Mr. Justice Brennan assert that a fundamental right of plaintiffs was violated by the sex discrimination which he found in the challenged statute in that case.

Rodriguez squarely holds that "education" is not a fundamental right in the sense that it is among the rights and liberties protected by the Constitution.

"Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." 93 S. Ct. at 1297.

If a student in a public educational institution has no fundamental Constitutional right to an education, it follows, *a fortiori*, that the teacher teaching that student has no fundamental Constitutional right to teach, absent any claim, and there is none such here, of her being deprived of such First Amendment rights as freedom of speech as in *Pickering v. Board of Education*, 391 U.S. 563 (1968), or due process of law, as in *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972). Respondents argued in the court below, and may be expected to argue here, that the mandatory maternity leave policy deprives them of such fundamental rights as the right to work, the right to marry, and the

right to bear children. This is simply not so. The only teachers' "right" affected by the Cleveland maternity leave rule is an asserted "right" temporarily to be employed as a Cleveland school teacher while in an advanced stage of pregnancy.

There is no claim that plaintiffs were denied procedural due process nor that they were placed on mandatory maternity leave for political reasons. No abridgment of free speech is asserted. Plaintiffs have no property rights to continue teaching other than those granted to them by state law. That is to say, no constitutionally protected rights are here involved. As Mr. Chief Justice Berger said in his concurring opinion in *Perry v. Sindermann*, 402 U.S. 593 at 603:

". . . the relationship between a state institution and one of its teachers is essentially a matter of state concern and state law."

And as Mr. Justice Stewart, speaking for the Court in *Board of Regents v. Roth*, the companion case to *Sindermann*, points out, "respondent's 'property' interest in employment . . . was created and defined by the terms of his appointment." 408 U.S. at 578.

The most recent opinion of a United States Court of Appeals construing Ohio law, subsequent to *Roth*, supports the view that in the absence of such first amendment claims as are not in issue here, an Ohio teacher has no Federal Constitutional rights arising above those of her contract and the laws of the State: *Patrone v. Howland Local Schools Board of Education*, 472 F. 2d 159 (6th Cir. 1972). To the same effect is *Orr v. Trinter*, 444 F. 2d 128, 133 (6th Cir. 1971), *cert. denied*, 408 U.S. 943 (1972), rehearing denied _____ U.S. _____, wherein the Sixth Circuit said there is "no constitutionally protected right to government employment" by an Ohio school teacher whose Constitutional rights were not violated by an unexplained refusal to renew his contract.

II. RESPONDENTS HAVE NOT BEEN DEPRIVED OF THE EQUAL PROTECTION OF LAWS

A. Rodriguez Supports the Traditional Standard of Review in Equal Protection Cases Involving Local Educational Policy.

The issue which this Court resolved in *Rodriguez* was whether the educational policy involved in that case, viz. the Texas method of raising funds for public school education by providing a certain amount from the state and leaving it up to each local school district to provide additional amounts, denied equal protection of law to children in certain poor districts. This Court held, as pointed out above, that no fundamental Constitutional right of the school was involved in the case.

In reaching this conclusion this Court first considered whether or not the challenged Texas educational policy created the kind of classification between students in poor and wealthy school districts which should be subjected to strict judicial scrutiny rather than analyzed under traditional standards of review. Plaintiffs had alleged, in *Rodriguez*, that the evidence established a definite class of poor children who were deprived of education by the classification and similarly alleged that a classification based on the wealth of each school district should be subjected to strict judicial scrutiny. This Court carefully and thoroughly reviewed the Texas system in the light of its dual purpose to extend and improve public education while maintaining local control. It concluded that:

“[I]n substance, the thrust of the Texas system is affirmative and reformatory, and, therefore, should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to rights reserved to the States under the Constitution.” 93 S.Ct. at 1300.

In rejecting strict scrutiny, which the Court describes as “its most exacting scrutiny”, 93 S.Ct. at 1294, the Court held that the system of alleged discrimination and

the class it defined had none of the "traditional indicia of suspectness". These indicia were explained:

"[T]he class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." 93 S.Ct. at 1294.

Having determined that such traditional indicia were absent, the court in *Rodriguez* stated:

"A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the state system be shown to bear some rational relationship to legitimate state purposes." 93 S.Ct. at 1300.

There followed in *Rodriguez* a careful review of the Texas system and a determination that it satisfied the two conflicting forces in public education, i.e., an educational opportunity for all children coexistent with the desire of each family to provide the best education it can afford for its own. 93 S.Ct. 1302-1305. This Court then concluded that not only was the action of the State of Texas in furtherance of a legitimate state purpose, but that the method chosen bore a rational relationship to that purpose.

The concurring opinion of Mr. Justice Stewart in *Rodriguez* is of substantial importance to the case at bar. Even though Mr. Justice Stewart stated that the challenged Texas State action created "a chaotic and unjust" system of public education in Texas, he said that it did not violate the Federal Constitution when tested by "principled adjudication under the Equal Protection Clause of the Fourteenth Amendment." 93 S.Ct. at 1310.

Mr. Justice Stewart made clear that the Equal Protection Clause "confers no substantive rights and creates no substantive liberties." Its function "is simply to mea-

sure the validity of *classifications* created by state laws" (emphasis in original). The Equal Protection Clause "is offended only by laws that are invidiously discriminatory—only by classifications that are wholly arbitrary or capricious." He said "the basic presumption of the constitutional validity of a duly enacted state or federal law" disappears only when a state had enacted legislation whose purpose or effect is to create classes based upon criteria that, in a Constitutional sense, are inherently "suspect", or, as has been pointed out above, that impinge upon a "substantive right or liberty created or conferred by the Constitution." 93 S.Ct. 1310, 1311.

Mr. Justice White dissented in *Rodriguez*, not because the state classification therein challenged did not further a legitimate state purpose. In fact, he believed that the Texas system "seeks to achieve the valid, rational purpose of maximizing local initiative." 93 S.Ct. at 1314. However, he felt that the means chosen by the State were not rationally related to the end sought to be achieved in that there was no adequate provision for poor school districts to augment their revenues. 93 S.Ct. 1311-1314.

B. The Local Educational Policy Promulgated by the School Board Regulation in the Case at Bar Fulfills a Legitimate State Objective in a Rational Way.

Tested by the standards of the majority in *Rodriguez*, as well as by the standards of Mr. Justice Stewart's concurrence and Mr. Justice White's dissent, the challenged school board regulation here meets the traditional test of Equal Protection. The evidence shows that the purpose of the regulation is to develop an orderly and efficient procedure to maintain an adequate continuity of able-bodied classroom teachers. The means chosen to effectuate that purpose is a fair one, even-handedly applied and supported by the best medical evidence that the Board could find.

Whether the mandatory maternity leave should begin at the beginning of the fifth or the sixth or the seventh month of pregnancy is medically debatable. The time chosen by the Board is close to that which doctors and lawyers themselves choose in determining whether a termination of pregnancy is abortion or a miscarriage. As Mr. Justice Blackmun stated for the Court in *Roe v. Wade*, 93 S. Ct. 705 (1973), the common law and Christian theology fixed the time at which a fetus becomes a "person" and infused with a soul at the "quickening", which is from the 16th to 18th week of pregnancy. The School Board here had to make a decision where to draw a line, and its decision to draw it where it did was neither arbitrary nor did it fail to achieve its purpose.

The difficulty of where a court or a state legislature or a school board should draw a line has been nowhere more clearly expressed than by Mr. Justice Holmes in his *Collected Legal Papers* (1921) where he says:

"In our approach towards exactness we constantly tend to work out definite lines or equators to mark distinctions which we first notice as a difference of poles. It is evident in the beginning that there must be differences in the legal position of infants and adults. In the end we establish twenty-one as the dividing point. There is a difference manifest at the outset between night and day. The statutes of Massachusetts fix the dividing points at one hour after sunset and one hour before sunrise, ascertained according to mean time. When he has discovered that a difference is a difference of degree, that distinguished extremes have between them a penumbra in which one gradually shades into the other, a tyro thinks to puzzle you by asking where you are going to draw the line, and an advocate of more experience will show the arbitrariness of the line proposed by putting cases very near to it on one side or the other. But the theory of the law is that such lines exist, because the theory of the law as to any possible conduct is that it is either

lawful or unlawful. As that difference has no gradation about it, when applied to shades of conduct that are very near each other it has an arbitrary look. We like to disguise the arbitrariness, we like to save ourselves the trouble of nice and doubtful discriminations." p. 232.

See also Mr. Justice Holmes' dissent in *Schlesinger v. Wisconsin*, 270 U.S. 230 (1925),

"... It seems to me not too late to urge that in dealing with state legislation upon matters of substantive law we should avoid with great caution attempts to substitute our judgment for that of the body whose business it is in the first place, with regard to questions of domestic policy that fairly are open to debate.

• • • • •

"... and while I should not dream of asking where the line can be drawn, since the great body of the law consists in drawing such lines, yet when you realize that you are dealing with a matter of degree, you must realize that reasonable men may differ widely as to the place where the line should fall." 270 U.S. at 241-242.

C. The Opinion of Mr. Justice Brennan in *Frontiero* Does Not Apply in the Circumstances of This Case to Require an Uncritical and Unqualified Application of the Suspect Classification Criterion.

The opinion of Mr. Justice Brennan in *Frontiero* is based, it is respectfully submitted, upon an unwarranted extension of *Reed v. Reed*, 404 U.S. 71 (1971), and upon the adoption, without saying so, of the language of the California Supreme Court in a case which holds directly contrary to an earlier and heretofore unchallenged decision of this Court. It is further submitted that the very reasons given by Mr. Justice Brennan to apply the suspect classification to the facts in *Frontiero* support its non-applica-

tion in the case at bar. It is suggested that whatever "romantic paternalism" existed in the attitude of the law towards women in the past, is today of historic interest only. Finally it is asserted that the argument that because Congress, by legislation, and the Equal Employment Opportunity Commission, by regulation, have abolished sex discrimination therefore this Court should declare sex a suspect classification is not valid as to the facts of this case.

To say that *Reed v. Reed* gives "at least implicit support", *Frontiero*, 93 S. Ct. at 1768, for a determination that sex is an inherently suspect classification is to extend and modify the opinion of the unanimous court in *Reed*. Similarly, to describe the language of *Reed* as a "departure from 'traditional' rational basis analysis with respect to sex-based classifications," 93 S. Ct. 1769, is a *tour de force* through what *Reed* actually says. The ground for the decision in *Reed* is set forth clearly in the following language:

"A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). *The question presented by this case*, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of Sections 15-312 and 15-314 [the challenged state statutes]." 404 U.S. at 76. (emphasis supplied).

Until Mr. Justice Brennan's opinion in *Frontiero* on May 14, 1973, this Court, including Mr. Justice Brennan, had asserted that that language quoted above constituted an adoption of the traditional standard. Mr. Justice Brennan so announced for this Court when he quoted *exactly this language* in *Eisenstadt v. Baird*, 405 U.S. 438, 446-447 (1972), prefacing the quote as follows:

"The basic principles governing application of the Equal Protection Clause of the Fourteenth Amendment are familiar. As THE CHIEF JUSTICE only recently explained in *Reed v. Reed*, 404 U.S. 71, 75-76, 30 L.Ed.2d 225, 229, 92 S.Ct. 251, (1971):"

Eisenstadt was decided in March, 1972, and the "familiar" "basic principles" therein described left, until *Frontiero*, no room for doubt.

The thrust of Mr. Justice Brennan's opinion in *Frontiero* is that the imposition of special disabilities upon the members of a particular sex solely because of their sex is suspect. He says:

"Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . ." *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175, 92 S. Ct. 1400, 1407, 31 L. Ed.2d 768 (1972). And what differentiates sex from such nonsuspect statutes as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members." *Frontiero*, 93 S. Ct. at 1770.

In the above quotation lies the basis for Judge Brennan's opinion that sex is a suspect classification, i.e., sex is suspect because "the sex characteristic" bears no relation to ability to perform.

In the case at bar, however, the record is clear that the sex characteristic has nothing whatsoever to do with the mandatory maternity leave rule. The mandatory maternity leave rule is a "nonsuspect statute" based upon

"physical disability." It has nothing to do with sex as such, but only when the condition of sex voluntarily creates another condition — pregnancy. Even then pregnancy is not the determining classification, but it is only when the time comes, on the basis of reasonable medical evidence and administrative necessity, that her pregnancy makes the school teacher physically disabled within the environment of the school classroom that the classification applies. Here is a case where ability to perform or contribute to society is hampered by the condition of pregnancy. Respondents would seek to hide their physical disability to perform in the classroom by attributing it solely to their sex.

It is of more than passing interest to note the origin of the language which Mr. Justice Brennan uses. It comes, almost word for word, from the opinion of the Supreme Court of California in the case of *Sail'er Inn, Inc. v. Kirby* 5 Cal. 3d. 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971). There the Court says:

"Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from nonsuspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society. (See Note: Developments in the Law — Equal Protection, *supra*, 82 Harv. L. Rev. 1065, 1173-1174.) The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members." 485 P.2d at 540.

Mr. Justice Brennan's opinion nowhere refers to *Sail'er Inn* and nowhere identifies the language of his opinion as coming from *Sail'er Inn*.

This is extraordinary because *Sail'er Inn* is squarely and directly in conflict with the decision of this Court in *Goesaert v. Cleary*, 335 U.S. 464 (1948). *Goesaert* is never mentioned in the opinion nor in any footnote in *Frontiero*.

The facts in *Goesaert* and the facts in *Sail'er Inn* could hardly be closer. *Goesaert* held constitutional, and not in violation of the Equal Protection Clause, a Michigan statute forbidding any female to act as a bartender unless she be "the wife or daughter of the male owner" of a licensed liquor establishment.

Sail'er Inn held unconstitutional, and in violation of the Equal Protection Clause, a California statute forbidding any female to act as a bartender unless she be the wife of the male owner or the sole shareholder (or with her husband) of a corporation holding the liquor license.

The Supreme Court of California, the same court whose opinion in *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601, (1971) was disapproved of and not followed by this Court in *Rodriguez* (see *Rodriguez* 93 S. Ct. at 1308), has now been followed, almost word for word, in an opinion concurred in by four judges in *Frontiero* without either an acknowledgment of its source nor a statement that the California decision is directly in conflict with a previous decision of this Court.

The *Harvard Law Review* citation which appears in both decisions contains the germ of some of the ideas expressed in the opinions but, except for a footnote at 1174, does not deal with sex as a suspect classification. Note, *Developments in the Law - Equal Protection*, 82 *Harv. L. Rev.* 1065, 1174 (1969). The footnote recognizes that sex is not a suspect classification "as long as experience teaches that the biological differences between the sexes are often related to performance," citing *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), and acknowledges that as the truth of that proposition is drawn into question so also will the non-suspect nature of a sex classification.

From the foregoing, it is clear that whatever the source of Mr. Justice Brennan's opinion in *Frontiero*, it is distinguishable from the case at bar. Here, unlike *Frontiero*, the condition of pregnancy is directly related to ability to

perform or contribute to society in the classroom. Nowhere in the record is there any allegation that women, as women, whether pregnant or not, are discriminated against by the challenged regulation of the Cleveland School Board. The only allegation is that at a certain time women, who are under a certain condition, i.e., pregnancy, are treated in a different fashion than women and men who are not in that condition. The record is clear that the reason for that treatment has nothing to do with the fact that respondents are women but everything to do with the fact that they are in an advanced stage of pregnancy. The distinction between pregnant and non-pregnant teachers does not relegate the non-pregnant teachers, because of their sex, to any inferior legal status and only temporarily affects pregnant teachers.

No female today, teacher or not, is required to become pregnant. Laws forbidding the dissemination of information about contraceptives are unconstitutional, *Griswold v. Connecticut*, 381 U.S. 479 (1965), whether the recipient be married or not, *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Laws prohibiting abortion during the first trimester of pregnancy are likewise unconstitutional, *Roe v. Wade*, 93 S. Ct. 705 (1973).

Roe v. Wade is relevant to, although not dispositive of, another point. That case establishes that *after* the first trimester of pregnancy, the State "may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." 93 S. Ct. at 732. This Court has thus recognized that in the interest of a prospective mother's own maternal health, reasonable regulations dealing with her pregnant condition may be imposed by the State after the first three months of pregnancy. While petitioners do not contend that the health of the pregnant teacher, for her sake alone, is a justification for the regulation, it is relevant to state, as the opinion of Mr. Justice Blackmun does in *Roe v. Wade*,

that there comes a time when the State does have an interest in the physical condition of a pregnant woman.

While the four judge opinion in *Frontiero* quotes liberally from the brief of the American Civil Liberties Union, *amicus*, as to the disadvantaged state of women in society, it recognizes that these disadvantages are largely historical, and, at the present time, by reason of federal legislation, no longer, in law, exist. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 e-2 (a), (b), (c) (1970), the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1970), and the proposed Equal Rights Amendment to the Constitution, March 22, 1972, H.J. Res. No. 208, 92d Cong., 2d Sess. (1972). In any event, as Mr. Justice Stewart stated in *Board of Regents v. Roth*, 408 U.S. 564, 579 (1972):

"It is a written Constitution that we apply. Our rule is confined to interpretation of that Constitution."

It is also relevant to point out that the Equal Employment Opportunity Commission regulations, while entitled to "great deference", *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971), are not of controlling weight here. The EEOC has adopted a rule prohibiting mandatory leave disability rules as discriminatory on the ground of sex. *Employment Policies relating to Pregnancy and Childbirth*, 29 C.F.R. § 1604.10(b) (1972). These regulations were issued after the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e(a), (b), and 2000e-1 (1972), was amended to apply to public school employment. One week after the passage of this 1972 Act, the Equal Employment Opportunity Commission issued new rules containing "guidelines" on mandatory maternity leaves. These guidelines made it a *prima facie* violation of Title VII for an employer to exclude employees "from employment . . . because of pregnancy." 29 C.F.R. § 1604.10(b) (1972).

The "guidelines" issued by the EEOC are to be distinguished from procedural "regulations" which are issued to carry out the provisions of Title VII. Any procedural

regulations issued by the EEOC require adherence to the Administrative Procedure Act, 42 U.S.C. § 2000e-12(a) (1964). The EEOC has issued procedural regulations which deal with such matters as the filing of charges and investigation of charges, pre-decision procedure, conciliation and settlement efforts and issuance of notices. 29 C.F.R. Part 1601 (1972).

The EEOC's *Guidelines on Discrimination Because of Sex* are in no sense procedural regulations but are based upon 42 U.S.C. § 2000e-12 (b) (1) (1964) which suggests that the Commission has authority to issue written interpretations and opinions.

The sex discrimination guideline quoted above was issued without adhering to the Administrative Procedure Act. Indeed, the sex discrimination guidelines adopted by the EEOC expressly so state:

"Because the material herein is interpretative in nature, the provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rule making, opportunity for public participation, and delay in effective date are inapplicable." 29 C.F.R. Part 1604 (1972).

This Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), not only stated that these guidelines were entitled to "great deference" but also that since the Act and its legislative history supported the Commission's construction in that case, it afforded good reason to treat the guidelines as expressing the will of Congress. 401 U.S. at 433-34.

Lower courts construing these guidelines have recognized that, while entitled to deference, they are "not a regulation having the force or effect of law." *American Newspaper Publishers Association v. Alexander*, 294 F. Supp. 1100, 1103 (D.D.C. 1968). In *Dobbins v. Local 212 International Bro. Elec. Workers*, 292 F.Supp. 413, 449 (S.D. Ohio 1968), it was expressly held that the EEOC can issue "suitable procedural regulations" but cannot issue substantive regulations with the force of law.

Since *Griggs v. Duke Power Co.*, the Sixth Circuit, in 1972, issued an important decision in *Espinoza v. Farah Mfg. Co.*, 462 F.2d 1331 (6th Cir. 1972). That case involved an EEOC guideline which sought to equate discrimination on the basis of citizenship with discrimination on the basis of national origin and went on to say that a lawfully immigrated alien cannot be discriminated against because of his foreign citizenship. The court refused to follow the EEOC guideline and stated:

"Thus, to the extent such discrimination has been declared by the EEOC to be *per se* illegal, we refuse to follow its regulation . . . while *acknowledging deference is due, blind adherence is not.*" (emphasis supplied). 462 F.2d at 1335.

It is thus submitted that where, as here, the challenged classification is based on disability and not sex, the four judge opinion in *Frontiero* supports petitioners position. It is clear from the concurring opinions of Mr. Justice Powell and Mr. Justice Stewart in *Frontiero* that the Air Force regulation challenged there worked an invidious discrimination against women within the traditional criterion of *Reed*, and that *Frontiero*, in their opinion, is simply a clear-cut application of *Reed*.

D. The Challenged Maternity Rule Is An Example of Local Initiative and Local Control Over Educational Policies.

The concern of the majority in *Rodriguez* for the principle of local control over public school systems is not a new departure for this Court. In *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968), it is said:

"Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."

Consistent with this is the statement in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) that "education is perhaps the most important function of state and local government."

In *Rodriguez*, this Court said:

"... This case also involves the most persistent and difficult question of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels." 93 S.Ct. at 1301.

Similarly, at 1305, the majority quotes the opinion of Mr. Justice Stewart in *Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972),

"[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society."

The concept of local control is deeply rooted in the Constitution and statutes of Ohio.

The Constitution of Ohio vests in the Ohio General Assembly the power to provide by law for "the organization, administration and control of the public school system." OHIO CONST. art. VI, § 3; art. I, § 7. The General Assembly has conferred upon each Board of Education "the management and control of all of the public schools of whatever name or character in its respective district." OHIO REV. CODE § 3313.47. A Board of Education is, in addition, expressly empowered to:

"make such rules and regulations as are necessary for its government and the government of its employees, pupils of its schools, and all other persons entering upon its school grounds or premises." OHIO REV. CODE § 3313.20.

Section 3319.13 of the OHIO REV. CODE provides that a Board of Education may grant *involuntary* leaves of absence to any teacher "because of physical or mental disa-

bility." In such case, the teacher has the right to request a hearing in accordance with § 3319.16 of the OHIO REV. CODE, which right is waived unless the teacher "demands in writing an opportunity to appear before the board" within ten days of notice of leave.

The record in the case at bar raises no question of failure on the part of the Cleveland school system to accord plaintiffs the full procedural due process required by the Ohio or Federal Constitutions.

The Ohio courts have recognized the importance of local control by Boards of Education and school administrators in Ohio:

"... [T]he rule-making power of such boards for the proper conduct, control, regulation and supervision of its employees, pupils and the entire school system is unlimited except to the extent that it is curtailed by express law, and ... in the absence of fraud, abuse of discretion or arbitrariness or unreasonableness a court will not interfere with the authority of a board of education to make rules and regulations, nor substitute its judgment for that of the board in the conduct of the affairs of the school." *Holroyd v. Eibling*, 116 Ohio App. 440, 445-46 (Franklin County Ct. App.), *appeal dismissed*, 174 Ohio St. 27 (1962).

E. Precedent Unqualifiedly Supports the Position that A Classification Based on Sex Should be Tested By the Traditional Standard of Review.

Prior to *Reed* and *Frontiero* there were at least five United States Supreme Court cases which expressly or impliedly required the application of the traditional standard in alleged instances of sex discrimination and violation of the Equal Protection of Law Clause.

In *Goesaert v. Cleary*, 335 U.S. 464 (1948), a Michigan statute forbidding any female to be a bartender, except the wife or daughter of a male bar owner, was held not to be a violation of equal protection of the laws. Mr. Justice Frankfurter, writing for the majority, stated:

"While Michigan may deny to all women opportunities for bartending, Michigan cannot play favorites among women without rhyme or reason. The Constitution in enjoining the equal protection of the laws upon States precludes irrational discrimination as between persons or groups of persons in the incidence of a law. But the Constitution does not require situations 'which are different in fact or opinion to be treated in law as though they were the same.' *Tigner v. Texas*, 310 U.S. 141, 147 . . . We cannot cross-examine either actually or argumentatively the mind of Michigan legislators nor question their motives. Since the line they have drawn is not without a basis in reason, we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling.

"It would be an idle parade of familiar learning to review the multitudinous cases in which the constitutional assurance of the equal protection of the laws has been applied. The generalities on this subject are not in dispute; their application turns peculiarly on the particular circumstances of the case." 335 U.S. at 466-67.

Again, in *Hoyt v. Florida*, 368 U.S. 57 (1961), this Court upheld, as consistent with the equal protection clause, a Florida statute exempting women from jury service absent their volunteering. In doing so this Court employed the reasonableness test:

"[W]e cannot regard it as irrational for a state legislature to consider preferable a broad exemption, whether born of the State's historic public policy or of a determination that it would not be administratively feasible to decide in each individual instance whether the family responsibilities of a prospective female juror were serious enough to warrant an exemption." 368 U.S. at 63.

To the same effect are the earlier cases of *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding an Oregon statute limiting hours of work for women); *Breedlove v. Suttles*,

302 U.S. 277 (1937) (Georgia statute exempting non-voting females, and others, from payment of poll tax held not to deny equal protection of the laws to males); *Radice v. New York*, 264 U.S. 292 (1924) (holding not a violation of equal protection a New York statute prohibiting the employment of women at night in restaurants in large cities).

More recently, this Court affirmed the holding of a three-judge court that equal protection is not violated by an obviously sex-based South Carolina statute limiting enrollment at Winthrop College exclusively to "girls." *Williams v. McNair*, 316 F. Supp. 134 (D. S.Car. 1970), *aff'd on appeal*, 401 U.S. 951 (1971). The unanimous opinion of the three-judge court is unqualified:

"The Equal Protection Clause of the Fourteenth Amendment does not require 'identity of treatment' for all citizens, or preclude a state, by legislation, from making classifications and creating differences in the rights of different groups. It is only when the discriminatory treatment and varying standards, as created by the legislative or administrative classification are arbitrary and wanting in any rational justification that they offend the Equal Protection Clause. Specifically, a legislative classification based on sex, has often been held to be constitutionally permissible. [Citing numerous cases.] Thus, the issue in this case is whether the discrimination . . . based on sex, is without rational justification.

. . .

" . . . While history and tradition alone may not support a discrimination, the Constitution does not require that a classification 'keep abreast of the latest' in educational opinion, especially when there remains a respectable opinion to the contrary; it only demands that the discrimination not be wholly wanting in reason. Any other rule would mean that courts and not legislatures would determine all matters of public policy." 316 F. Supp. at 136-137. (footnotes omitted).

It is of interest to note that this Court's "summary disposition of the case . . ." has been said to "suggest the

Court is not about to impose strict standards of review in sex classification cases." Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871, 881 (1971).

Indeed, of the cases in the various Circuits of the Court of Appeals and in the Supreme Court of Pennsylvania, which have reviewed the constitutionality of mandatory maternity leaves, only two have applied the strict standard. One is the Sixth Circuit in the case at bar. Even then, an attempt was made to pay lip service to *Reed*. 465 F.2d at 1188. The other is *Buckley v. Coyle Public School System*, 476 F.2d 92 (10th Cir. 1973). *Buckley* simply reversed a summary judgment for the Board of Education, held that evidence was required and adopted the strict standard because of allegations of racial discrimination and First Amendment denials.

Of course, the case being argued in tandem with this case, *Cohen v. Chesterfield County School Board*, No. 72-1129, adopts the traditional rule, both in the opinion in the Court of Appeals, 474 F.2d 395 (4th Cir. 1973), and in the District Court, 326 F. Supp. 1159 (1971). In *Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971), the Ninth Circuit upheld an Air Force regulation providing for discharge of pregnant women officers on the traditional equal protection standard. The same result was reached by the Fifth Circuit in *Schattman v. Texas Employment Commission*, 459 F.2d 32 (5th Cir. 1972), cert. denied, 93 S. Ct. 901 (1973). In *Green v. Waterford Board of Education*, 473 F.2d 629 (2nd Cir. 1973), the United States Court of Appeals for the Second Circuit on January 29, 1973, adopted what it called the "rational basis scrutiny" as the appropriate standard of review. 473 F.2d at 632, 633. In that case summary judgment had been granted to a Board of Education by the District Court. 349 F. Supp. 687 (D. Conn. 1972).

The Second Circuit reversed. It took the position that this Supreme Court,

"... has apparently narrowed the linguistic gap between the two standards; it has avoided the terminology of two-tiered review in some cases, by posing instead certain fundamental inquiries applicable to 'all' equal protection claims." 473 F.2d at 633.

The Court then quotes from *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, 173 (1972) that "the essential inquiry" in all equal protection cases is a dual one, i.e.,

"What legitimate state interests does the classification promote? What fundamental personal rights might the classification endanger?" 473 F.2d at 633.

It also quotes from *Police Department v. Mosley*, 408 U.S. 92, 95 (1972), as to the rule that in all equal protection cases the crucial question "is whether there is an appropriate governmental interest suitably furthered by the differential treatment." 473 F.2d 633.

The Second Circuit, in *Waterford*, describes the "heart of plaintiff's case" as follows:

"The heart of plaintiff's case is that disqualifying a physically capable women from working because of a condition related solely to her sex is unconstitutionally discriminatory . . . Because male teachers are not forced by defendant Board to take premature leave because of a known forthcoming medical problem, female teachers should not be treated differently. Thus stated, the argument is persuasive, even compelling." 473 F.2d at 634.

The weakness of the *Waterford* argument is recognized in the next paragraph of the opinion where the Second Circuit says,

"... Indeed, we note that a principal problem on this appeal is an altogether abbreviated record, consisting of little more than plaintiff's verified complaint,

defendant's answer, a few short interrogatories, the argument on the motion for a preliminary injunction, and the district judge's opinion. We thus have no assurance that any legitimate interest arguably promoted by the rule has been identified or articulated by the Board." 473 F.2d at 634.

In the next paragraph it is pointed out that defendant Board had not offered any evidence as to the competency of a pregnant woman. Later in the opinion the Second Circuit says:

"When the comparison is with other female teachers, any justification for focusing solely on those who are pregnant is still more dubious in the abstract and wholly so on this record." 473 F.2d at 635.

The court concluded with these words:

"From the foregoing analysis, we conclude that the Board's maternity leave rule, which arbitrarily forces a *physically capable woman like plaintiff* to leave her job before required to do so for medical reasons, is discriminatory and that there are no 'legitimate state interests' which the rule's rigid classification sufficiently promotes to justify such discriminatory treatment." (emphasis supplied) 473 F.2d at 636.

Waterford is, actually, the strongest authority in support of petitioners' case. It is apparent from *Waterford* that had evidence been before that Court as to the physical disqualification of the pregnant teacher, the result would have been in favor of the Board of Education. Unfortunately, the case was decided on a poor record. The "heart of plaintiff's case" is "disqualifying a physically capable woman." The record in the case at bar, unlike the record in *Waterford*, is full of sound and undisputed medical evidence that a pregnant school teacher is not a physically capable woman in the classroom.

The analogy in *Waterford* to a male teacher's operation falls on its face. It is not the planned operation months ahead that disqualifies the male teacher, it is whether or

not the male teacher is presently unable to teach. If a cataract operation, for example, were necessary because the male teacher had become physically so impaired in his vision that he could not teach, then he should be placed on leave of absence. Ohio statutes so provide. OHIO REV. CODE § 3319.13. Here however, it is a disability caused by pregnancy and not a disability to be caused at some future time by some future operation which disqualifies the teacher. On the record before it, *Waterford* is correct. On the record before this Court in this case, *Waterford* is good authority for petitioners.

In addition to the case at bar from the Sixth Circuit, the case in tandem with it, *Cohen v. Chesterfield County School District*, 474 F.2d 395 (4th Cir. 1973), *Waterford* and *Buckley*, two other Circuits of the Court of Appeals have considered the constitutionality of mandatory maternity leaves. In both of them, the regulations were upheld.

The Fifth Circuit, in *Schattman v. Texas Employment Commission*, 459 F.2d 32, *cert. denied*, 93 S. Ct. 901 (1973), considered a somewhat stricter rule than the rule in the case at bar because not only were pregnant employees there required to take a leave no later than two months before the expected delivery date but they had no assurance of reinstatement. The Court below in the case at bar attempted to distinguish *Schattman* on the ground it was not as stringent a rule as that in the case here. However, *Schattman* stated that the rule there applied not only to leaves beginning at the end of seven months of pregnancy but at earlier periods as well. The court said:

"The record further shows that one Texas agency terminates its women employees at the end of the fifth month of pregnancy and others at the end of six months. Still others terminate at the end of the seventh month." 495 F.2d at 40.

The Ninth Circuit, in *Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971), upheld against an Equal

Protection claim a regulation of the Air Force which provided for the discharge of pregnant women officers.

Both *Struck* and *Schattman* adopt the traditional rational basis test. *Schattman* specifically relies upon *Reed*.

As to *Cohen*, which is presently before this Court, the Fourth Circuit majority therein held that the mandatory maternity leave rule did not create an invidious discrimination based upon sex. That Court also held that the rule had a rational basis in the administrative necessity of continuity of classroom instruction. 474 F.2d at 399.

Little need be said of the case of *Cerra v. East Stroudsburg Area School District*, _____ Pa. _____, 299 A. 2d 277 (1973). That case involved a mandatory maternity leave but the Court's decision turned on a violation of the Pennsylvania Human Relations Act, 43 P.S. § 955(a) (1955). The Court specifically said:

"... it is unnecessary to determine if Mrs. Cerra's rights to Equal Protection and Due Process under the Fourteenth Amendment to the United States Constitution were also violated." 299 A.2d at 279.

Instead the case was decided on a record that failed to show that the teacher was "incompetent" within the meaning of a Pennsylvania statute. The Court concluded:

"There was no evidence that the quality of her services as a teacher was or would be affected as a result of the pregnancy." 299 A.2d at 280.

Thus, in the absence of evidence that, while teaching, pregnancy prevented the teacher from doing her job as an able-bodied person, the Court could only reach the result that it did.

F. Even Tested By The Suspect Classification Standard, the Challenged Regulation in the Case at Bar Does Not Violate the Equal Protection Clause.

If this Court were to adopt as its majority view the rule that the school board regulation here challenged is

to be treated as inherently suspect and subjected to the strict standard of judicial review heretofore reserved for cases such as race, alienage, indigency and national origin, it is submitted that the regulation should still be upheld.

The undisputed evidence before this Court established that a pregnant school teacher after the fourth month of pregnancy is not as able-bodied in the classroom as she was before pregnancy. She cannot perform the physical tasks which she is required to perform with the same degree of mobility and ease that she could when not pregnant. The uncertainty of the time when she will leave the school affects the administrative operation of the school and makes it difficult to maintain the continuity of the educational process.

On these facts, even if this Court were to apply strict judicial scrutiny, the regulation should be upheld.

That is to say, if this Court should determine that the burden of proof of the reasonableness of the regulation lies upon the school board, that burden has been met by the evidence before this Court. The regulation is not arbitrary nor does it affect the female teacher unless she is over four months pregnant. Healthy, active, able-bodied female teachers are not affected and the only effect it has on pregnant school teachers is to deprive them of a few months salary during a period of time when they are demonstrably not as able-bodied as they were before.

Having in mind the importance of local control over educational policy within the school district as emphasized by *Rodriguez*, as well as the non-existent property interests of the plaintiffs, in a Constitutional sense, to continue teaching, as delineated in *Roth*, and *Sindermann*, even under the strict scrutiny test the regulation should be upheld.

CONCLUSION

It is respectfully submitted that for the foregoing reasons, the judgment of the United States Court of Appeals for the Sixth Circuit should be reversed and the judgment of the United States District Court for the Northern District of Ohio, Connell, J., should be reinstated.

Respectfully submitted,

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EXHIBIT A**CATALOGUE AND BIBLIOGRAPHY OF
DISORDERS, DISCOMFORTS AND
COMPLICATIONS OF PREGNANCY****I. IN GENERAL**

The purpose of this Appendix is to present a bibliographic catalogue of the medical problems associated with pregnancy. The catalogue was derived from a review of medical journals, monographs, textbooks and other key references in the area of obstetrics and represents only the most current and widely-held medical opinion. No information that is subject to scientific substantiation or that is generally controversial is included unless it is so qualified.

For ease of presentation, the medical problems generated by pregnancy have been divided into three categories. Included in the first category are those disorders due to pregnancy that are generally considered serious and that require close medical supervision and care. Included in the second category are afflictions that cause discomfort to the pregnant woman but do not present a danger to the mother or fetus except in rare circumstances. The third category contains those diseases and disorders that are not caused directly by pregnancy but that may either interfere with or be complicated by pregnancy.

II. DISORDERS DUE TO PREGNANCY

A. Toxemia. Toxemia of pregnancy occurs in 6 to 7 percent of all pregnant woman and accounts for about one-third of the maternal deaths and at least 30,000 stillbirths per year in the United States. From 90 to 95 percent of the cases occur after the 30th week of pregnancy. A number of isolable factors have been thought to exercise some influence on the incidence of toxemia of pregnancy. One such factor is race, toxemia having been seen more often in non-white than in white women. The socio-economic

status of the mother is also cited as an influence. Indigent patients with poor diets and a haphazard exposure to prenatal care regularly exhibit a higher incidence of toxemia than private patients with good overall nutritional status who seek medical supervision early in pregnancy. Toxemia also occurs more frequently in multiple (i.e. twins) than in single pregnancies. Other specific predisposing factors include hydatidiform mole—the replacement of normal placental architecture by grape-like blisters—which may be responsible for those rare cases of toxemia seen prior to the 24th week; obesity, which predisposes to both hypertensive disease and pure toxemia; and diabetes, of which toxemia is a feared and frequent complication.

Psychologic considerations. Salerno, struck by the high incidence of toxemia in first pregnancies, questioned why that incidence should be higher in a group of younger women than in older women whose environmental conditions were approximately the same. He surveyed 1,176 consecutive deliveries in an urban hospital composed mainly of Puerto Rican women of poor socio-economic status and encountered 51 instances of toxemia. The basic pattern of these women was one of youth, first pregnancy, and unwed status. This combination of stressful circumstances, he believed, may lead to a body reaction allied to the general adaptation or stress syndrome which could produce a disturbance of the hypothalamic-pituitary-adrenal axis, which, in turn, could cause toxemia.

Bell and Wills made a study of racial differences in the incidence of toxemia on Fiji which also serves as an illustration of the psychologic factors in toxemia. Fijian natives who live a happy communal life without overt tensions have a low incidence of toxemia. An expatriate group of Indians, living under extreme psychologic stress on the same island, have a much higher incidence of toxemia despite a far superior diet. There is also some evidence that toxemia is more frequently encountered in

schizophrenic mothers than in otherwise similar non-schizophrenics but the data are fragmentary and inconclusive.

Definition. The term "toxemia" as it is used today has departed far from the original connotation of a "toxin" circulating in the blood. It is now a general term that describes a complex disorder of pregnancy, the most distinctive characteristic of which is hypertension. A great many of the women with toxemia all show albuminuria—protein in the urine. Toxemia is composed almost completely of two syndromes which have many similarities: (1) the acute form (preeclampsia-eclampsia) and (2) the chronic form (chronic vascular hypertension); some women can have both in the same pregnancy.

Preeclampsia and Eclampsia. Preeclampsia and eclampsia are the same disease complex, eclampsia being the worse manifestation. Less than one percent of the cases of preeclampsia deteriorate into eclampsia. Eclampsia is established by the appearance of convulsions.

Symptoms are usually completely lacking in the early stages of preeclampsia. Occasionally, however, complaints may include vague malaise, loss of appetite, headache or weakness. Definite signs are increased blood pressure, excessive weight gain, edema—the presence of abnormally large amounts of fluids in the tissue spaces of the body—greater than the usual slight swelling of the feet, and albuminuria. Dangerous symptoms are severe persistent headache, drowsiness, amnesia, vertigo, and visual disturbances (spots or flashes, blurred or double vision, blindness). Signs of severe or increasing involvement are nausea and vomiting, edema of the optic discs, vomiting of blood, jaundice, steadily increasing blood pressure, high pulse rate, respiratory changes, increasing widespread edema, lessened urinary output and severe albuminuria. Twitching of the extremities is ominous and may herald the onset of

convulsions. Eclampsia may appear suddenly, a convulsion being the first manifestation.

The convulsions of eclampsia are dramatic. Labor is often brought on by eclamptic convulsions, and occasionally delivery is precipitated by the strain. Even with the best treatment, some 5 percent of eclamptic mothers still die. The most common cause of fetal death in toxemia is premature delivery and its associated complications.

Chronic Vascular Hypertension. Chronic vascular hypertension is included as a toxemia of pregnancy because of its resemblance to the acute form (preeclampsia-eclampsia) in diagnosis, treatment, prognosis for the mother and fetus, and because of the susceptibility of women with the chronic form to acquire the acute form. The disease is generally diagnosed when the blood pressure stands at 140/90 or above prior to the 24th week of pregnancy and there is subsequent evidence that the hypertension persists indefinitely after delivery.

B. Hemorrhages. The disorders of late pregnancy associated with hemorrhage are major factors in maternal mortality and contribute appreciably to the loss of fetal lives. Vaginal bleeding in the latter half of pregnancy occurs in about 5 percent of pregnant women. Significant blood loss is usually indicative of placental separation associated with placenta previa or abruptio placentae.

Placenta Previa. Placenta previa is a condition in which the placenta is located over the cervical canal instead of in its normal position higher in the uterus. A placenta in this aberrant position may cover the cervical canal entirely (total placenta previa) or cover only a portion of the cervical canal (partial placenta previa).

Abruptio Placentae. The premature separation of the normally implanted placenta prior to the birth of the baby is designated as "abruptio placentae". Normal separation

of the placenta from its attachment inside the uterus takes place as the uterus contracts within a few minutes after the delivery of the baby. Although abruption occurs most often after the 28th week of gestation, it may develop earlier in pregnancy. Premature placental separation prior to the 20th week is part of the abortion process.

In rare cases, trauma has produced abruption. On occasion, the mother, previously well, has developed the signs and symptoms of abruption promptly after a serious accident. This, when combined with a lack of systemic signs often associated with abruption and a lack of pathologic change in the placenta has supported the possibility that trauma has caused the abruption.

There are a number of other conditions which may predispose to the occurrence of abruptio placentae.

Abruptio placentae has been reported to occur as often as once in 85 to 200 deliveries. Its incidence varies considerably in different institutions, depending on the hospital population and the diligence of the staff in establishing the diagnosis. Undoubtedly, many mild and localized separations escape notice because of the rapidity of delivery and the absence of serious complications. The patient who, in the latter part of pregnancy, develops uterine hemorrhage associated with pain usually has abruptio placentae.

In the patient with moderately severe abruptio placentae, abdominal pain is the rule and uterine tenderness is apparent.

The maternal mortality rate in abruptio placentae is probably between 1 and 2 percent. In severe abruptio placentae the fetus usually succumbs before definitive treatment can be instituted.

C. Genital Complications.

Rupture of the Pregnant Uterus. Rupture of the pregnant uterus is confined almost exclusively to the last tri-

mester of pregnancy. The rupture occurs most frequently at the site of an old incision in the uterus that has been previously subjected to cesarean section. The incidence of rupture of the uterus is somewhere between 1 in 1,000 to 2,000 deliveries. It may occur during pregnancy or labor; it may be spontaneous or traumatic in origin. A sharp blow to the abdominal wall can rupture the uterus when the latter is large enough to be in an exposed position.

Hemorrhage and pain are the most common aspects of a ruptured uterus although these symptoms are not always present and the degree of intensity varies.

Prompt surgical intervention and blood replacement as practiced in modern hospitals have changed the maternal prognosis from extremely serious to one in which death should be rare. The loss of the mother's uterus and further reproduction is the gravest aspect in the prognosis.

Extrauterine Gestation. Practically all extrauterine pregnancies occur in the fallopian tubes. Abdominal pain and a disturbance of the menstrual cycle are the leading clinical features of tubal pregnancies.

D. Premature Labor. Premature labor is arbitrarily defined as labor resulting in a live infant weighing not more than 2,500 grams ($5\frac{1}{2}$ pounds) at birth. Infants with a birth weight of less than 1,000 grams, because of their extremely poor chances for survival are often characterized as "immature". Prematurity ranks first among the causes of death of the newborn, accounting for the loss of more than 60,000 infants annually in the United States, or nearly $\frac{2}{3}$ of all deaths during the neonatal period. The mortality among premature infants as a group averages 20 to 25 times that among infants of term weight, the risk of death being related directly to the degree of prematurity, i.e., inversely to the birth weight. Year in and year out, between 7 and 8 percent of all live births in the United States are premature.

Premature labor may be initiated by a variety of factors: maternal, fetal, and placental. No all-encompassing cause of prematurity has been recognized but there are clearly a number of predisposing conditions. Prominent among these stands multiple pregnancy (i.e. twins), doubtless because of the excessive distention of the uterus it produces. Toxemia of pregnancy is frequently associated with prematurity, but in the majority of cases only because it necessitates artificial termination of pregnancy by therapeutic induction of labor or cesarean section. The convulsions of eclampsia nearly always prematurely activate the labor mechanism. Chronic hypertensive vascular disease produces a doubling of the frequency of spontaneous premature labor.

A British numerical study (Stewart) concluded that women gainfully employed during the latter part of pregnancy experienced premature births approximately forty-four per cent more frequently than those not so employed. In addition, the study found the prenatal death rate and the incidence of toxemia also were higher among women gainfully employed. Another British study (Douglas) found that "women who have been gainfully employed during the last five months of pregnancy more often have premature babies than those who have left work at an earlier date." (Douglas, p. 165) While both studies cautioned that other factors interplayed with the factor of employment, the Douglas study attempted to create carefully matched "samples" and on the basis thereof concluded "that paid work [as carefully distinguished from household work] during the last months of pregnancy is associated with an increased risk of premature delivery." (Douglas, p. 166)

Other common medical conditions that predispose to premature labor include acute systemic infections, diabetes, hyperthyroidism, cardiac decompensation and chronic debilitating disease. Cigarette smoking has been also suggested as a likely cause of premature labor.

Accidents of placental implantation, such as placenta previa, and placental abruption, in addition to necessitating early delivery, cause a fivefold increase in the frequency of spontaneous premature labor; nearly half of all pregnant women with these complications fall into labor prematurely.

Trauma, such as accidental falls or blows to the maternal abdomen, may initiate premature labor by causing either rupture of the membranes or partial separation of the placenta. Surgical operations may likewise trigger labor prematurely after a latent period of approximately 48 hours; however, their mode of action is not so apparent.

E. Trauma.

Susceptibility to Trauma. As noted above, the increasing weight of the uterine mass, the protuberance of the abdomen, the change in the center of gravity of the mother and the frequent cramping and loss of sensation in the lower extremities make the pregnant women more prone to accidents and injuries than the non-pregnant woman. The mother's susceptibility to psychological trauma is generated by maternal instinct and the strong desire to protect the baby at all costs.

Trauma and Pregnancy Preceding Labor — Premature Rupture of Membranes. The fetal membranes in the ordinary course of events line the uterine cavity and completely surround the fetus. The principle functions of the membranes appear to be to retain and to assist in forming the amniotic fluid. Since the specific gravity of the infant is, for practical purposes, the same as the specific gravity of the amniotic fluid, the growth and development of the fetus occurs in a stable, mechanically buffered environment and in a state of relative weightlessness. Provision is thereby made for the unimpeded growth and development of the extremities and for muscular activity.

One of the hazards in all pregnancies is the premature rupture of the fetal membranes following the completion of the 6th month of gestation. Once the fetal membranes have broken and enough amniotic fluid escapes, premature delivery will usually follow. One of the possible reasons for membranes rupturing is the increase in intra-amniotic pressure. Theoretically, an accidental or intentional blow to the abdomen could build up enough intra-amniotic tension to produce a membrane rupture. However, the relationship between physical trauma and the rupture of the membranes has not been unequivocally established.

Trauma and the Rupture of the Uterus. The most frequent factor in uterine rupture is scarring of the uterus by previous surgery and the most common scar is the result of a previous cesarean section. A sharp blow on the abdominal wall when an old incision is present can rupture the uterus. With prompt recognition, the availability of a blood bank and with good surgical technique the maternal mortality rate following a rupture may be kept to a minimum; however, the fetal mortality in uterine rupture is approximately 30 percent.

Trauma and Hemorrhage. Placenta previa is not caused by trauma, but hemorrhage from it may be precipitated by external trauma, for example, intercourse. However, physical trauma has on occasion been the cause of the abruption of the placenta.

III. DISCOMFORTS DUE TO PREGNANCY

A. *Weight Gain and Awkwardness.* During the first months of pregnancy, the mother ordinarily loses a few pounds of weight, possibly as a result of nausea, but, during the entire pregnancy, the average weight gain is approximately 20 pounds. Most of this gain occurs during the last two trimesters. Often during pregnancy the mother has a greatly increased desire for food, partly as a result

of fetal removal of food from the mother's blood and partly because of hormonal factors. Some mothers, lacking discipline, eat tremendous quantities of food, and the weight gain, instead of averaging 20 pounds, may be as great as 75 pounds or more.

This increase in weight results in a marked lordosis—a backward arching of the lower part of the vertebral column—which changes the center of gravity of the pregnant woman, and results in an awkwardness of gait. Awkwardness is enhanced by the fact that the circulation to the lower extremities is compromised by the oxygen needs of the placenta and a certain amount of the oxygen meant to be utilized by the muscles of the lower extremities is stolen, in a sense, as the blood circulates toward the extremities from the heart. Deprived of good oxygenation, the muscles of the lower extremities are frequently known to go into spasm or to develop areas of loss of sensation, all of which may interfere to some extent with the gait of the pregnant woman. Because of these factors a pregnant woman has an increased propensity to accidents and injuries. Often pregnant women fall flat on their seats sustaining injury to the coccyx—the small bone which forms the extreme tip of the lower end of the spinal column lying just above the anus. Fractures of the forearm and of the leg or ankle bones are not uncommon in an obstetrical practice.

B. Nausea and Vomiting. During pregnancy, approximately 50 percent of the mothers develop hyperemesis gravidarum, a condition characterized by nausea and vomiting and commonly known as "morning sickness". Nausea and vomiting when experienced appear in about the 5th or 6th week of pregnancy and last for an indefinite period. Symptoms vary in severity from simple "morning sickness" to pernicious vomiting. Morning sickness begins with a feeling of nausea on arising; the mother is unable to retain her breakfast, but by noon the symptoms have

disappeared. The mother feels well until the following morning, unless symptoms are restimulated by some idiosyncrasy of taste or smell.

C. Urinary Discomforts. Pressure of the fetus against the bladder may produce a variety of urinary symptoms, including frequency, urgency, and the involuntary discharge of urine, often to a troublesome extent.

D. Backache and Pelvic Pain. The weight of the pregnant uterus can cause discomfort or pain in the pelvis, especially on the right side. Pain in the low back is also a troublesome complaint during pregnancy. It results from poor posture, fatigue, and lack of abdominal support. Aches and pains ordinarily can be relieved effectively by an abdominal or sacroiliac support, by increasing the daily rest period, or by changing the shoe style.

E. Cramps. The majority of pregnant woman experience cramps in the calves of the legs. These cramps are not caused by trauma or, indeed, by any recognized mechanism. A sudden cramp—a convulsive contraction of the muscle—suddenly appears in the calf and disappears rapidly with massage or active motion. It is generally not serious and carries no ill consequence.

F. Varicose Veins. Unnaturally swollen veins are ever prevalent in pregnancy. Varicose veins of clinically significant size first appear during the second or third month of gestation. The varicosities usually are located in the lower extremities either singly or in a wide distribution over thighs and legs. It has been variously estimated that from 20 to 50 percent of pregnant women exhibit some degree of varicosity of the leg and thigh veins, but only some 10 percent of these patients complain of disabling symptoms. More than half of all symptomatic cases will have developed by the end of the first trimester of pregnancy. Even when varicose veins are asymptomatic they can be prominent and unsightly.

A frequent initial complaint is an itching or burning of the skin overlying the engorged veins, often accompanied by a vague but uncomfortable sensation of heaviness in the affected parts. Sometimes the mother complains of an unsightly bluish discoloration of the skin over the varicosities. In addition, varicose veins can cause cramping, fatigue and slight to moderate pain in the muscles of the thighs and legs. All of these symptoms tend to increase as term is approached when the affected veins enlarge to their greatest extent. For treatment, periodic elevation of the legs is often recommended, a suitable routine being 3 times daily for periods of 10 minutes each. A maternity girdle and the avoidance of encircling garters and elastic stockings usually afford partial relief of the discomfort.

Varicose veins are not caused by trauma, but they have a susceptibility to injury that normal veins do not possess. Further, severe varicose veins carry a predisposition for thrombosis and there is a potential danger from hemorrhage should the veins become lacerated or severed.

G. Excessive Salivation. Excessive salivation, also known as ptyalism, occasionally occurs in pregnancy. The repeated filling of the stomach with saliva in large amounts contributes to the urge to retch. The mother and the fetus can be adversely affected only if the ptyalism merges with a serious manifestation of hyperemesis gravidarum (discussed above).

H. Heartburn. Heartburn (pyrosis) describes a burning sensation around the esophagus and is a common complaint in pregnancy, often causing considerable distress. To some extent, heartburn can be treated with a variety of substances that neutralize gastric hydrochloric acid.

I. Constipation. Constipation is an exceedingly common complaint of pregnancy. The exact cause of the decreased ability to evacuate the bowel during pregnancy

has not been determined. In the later weeks of pregnancy, the weight of the fetus on the lowest part of the large bowel tends to aggravate the condition. Hemorrhoids and other anal lesions are the only serious consequences of constipation.

J. Hemorrhoids. Hemorrhoids are dilated veins about the anus and are a frequent plague of pregnant women. Hemorrhoids may appear for the first time during pregnancy, or the condition may antedate pregnancy but become prominent only during the gestation period. External hemorrhoids are not troublesome unless there are complications. If they become infected, pain and itching may develop. At times, external hemorrhoids rupture and cause great pain. Internal hemorrhoids are more likely to become symptomatic, the most common symptom being bleeding. The amount of blood lost varies; usually, there is only spotting, but at times, a very painful thrombosis may result.

K. Anxiety. In most women the maternal instinct is so profound that any experience, however slight, which is believed to interfere with the health and welfare of the baby, may produce anxiety and concern. A reduced span of concentration is common to most pregnant women. Except for the psychotic patient who is out of touch with reality, pregnancy generally constitutes a crisis in the life of the average woman. Anxiety is present most frequently in a woman pregnant for the first time and is caused by her awareness that pregnancy means irreversible anatomic changes, an entirely new set of psychological relations with her husband and child and the termination of childhood.

IV. COINCIDENTAL MEDICAL DISORDERS COMPLICATING PREGNANCY

A. Disorders of the Cardiovascular System.

Heart Disease. If it is of sufficient magnitude, heart disease increases the risk in pregnancy for both mother

and fetus. Congestive heart failure is a constant threat not only because of the increased burden carried by the prospective mother but also because the blood volume of the pregnant woman rises during pregnancy.

Hypertension. The mother with underlying primary hypertension which remains uncomplicated may go through pregnancy with little additional risk to herself, but with a higher than average expectancy of miscarriage or fetal death. Hypotensive drugs (those which reduce blood pressure) are generally used throughout pregnancy to reduce blood pressure and prevent complications. However, in about one-half of the hypertensive mothers, preeclampsia becomes superimposed. When this occurs, there is a significant increase in risk to both the mother and the fetus. Furthermore, when kidney impairment accompanies hypertension in pregnancy, the prognosis is always serious.

B. Alimentary Tract and Liver Diseases.

Acute Appendicitis. Acute appendicitis complicates about one in 1,000 to 1,500 pregnancies, but since the maternal and fetal mortality rates associated with this disease are high, it should be regarded as one of the serious complications of gestation. The risk is greatest in the third trimester and during labor, when the large active uterus interferes with the ability to localize the infection.

Duodenal Ulcer. Peptic ulcer occurs in the portions of the gastrointestinal tract in which the acid pepsin is found. The great majority of such ulcers may be treated medically, and this is particularly true in pregnancy, when many patients experience some relief of symptoms. However, in some instances peptic ulcers are aggravated by pregnancy and, in exceptional circumstances, the safety of the mother and fetus may be seriously jeopardized.

Hepatitis. Hepatitis seems to show a predilection for younger age groups and is not infrequently encountered

in pregnant women. The prejaundice phase is usually characterized by fatigue, malaise, headaches, loss of appetite, nausea, vomiting, dark urine and light stools.

C. Disorders of the Kidney. Diseases and inflammations of the kidney are almost invariable aggravated by pregnancy, particularly if hypertension is also present.

D. Disorders of the Endocrine System.

Diabetes Mellitus. Diabetes mellitus is known to complicate pregnancy in about one in 100 to 200 mothers; these figures undoubtedly do not include many patients with latent diabetes which escapes recognition in spite of suggested maternal complications and fetal death. Trauma on occasions has been linked with the onset of diabetes, although the physical and emotional blows that preceded the diagnosis of diabetes may have instigated the examinations that uncovered diabetes rather than actually caused the disease. The two most important effects of diabetes on pregnancy are oversized fetuses and fetal death in utero.

Other associated complications include abortion, excess amniotic fluid accumulation, malpresentation, toxemia and fetal malformation. Meticulous management, which includes constant and continuing diabetic supervision, is a basic necessity for diabetic mothers. These mothers must be seen by the physician at frequent intervals throughout pregnancy. Diabetic or obstetric complications may also require prompt hospitalization.

Hyperthyroidism. Hyperthyroidism is an uncommon complication during pregnancy; its estimated incidence is one in 1,000 to 2,000 pregnancies. Nevertheless, management of this disease is important, as hyperthyroid states may have serious effects on both mother and baby.

E. Respiratory Diseases.

Common Cold. An acute cold is significant because in many cases it precedes the development of pneumonia. In

the pregnant individual it may complicate the choice of anesthetic or predispose to secondary bacterial invasion, notably by the streptococcus, which increases the risk of fetal infection.

F. Anemia. The most frequently encountered complication of pregnancy is anemia. Approximately 60 percent of pregnant women have some degree of anemia. In the United States practically all of the anemia is hypochromic — the iron deficiency variety. The most frequently proposed reason for this hypochromic anemia is a nutritional one, based on the deficiency of iron in the diet. The anemia is more prevalent in low-income groups than in high-income groups. Except in extreme cases this anemia is not attended by severe irreversible organ changes. Moderate to severe anemia from whatever cause significantly increases the risk of infection and the susceptibility of the mother to shock from blood loss, trauma, or anesthesia at the time of delivery.

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CERTIFICATE OF SERVICE

Three copies each of the Brief for Petitioners on Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit have been served this 21st day of June, 1973, by depositing same in a United States Mail Box, First Class, postage prepaid, addressed to Jane M. Picker, Lizabeth A. Moody, Rita Page Reuss, and Charles E. Guerrier, 620 Keith Building, 1621 Euclid Avenue, Cleveland, Ohio 44115, Counsel for Respondents, and Lewis R. Katz, 11075 East Boulevard, Cleveland, Ohio 44106, of Counsel for Respondents.

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 72-1129

SUSAN COHEN,
Petitioner-Plaintiff,

vs.

CHESTERFIELD COUNTY SCHOOL BOARD,
Respondent-Defendant.

On Review from the United States Court
of Appeals for the Fourth Circuit.

MOTION

**For Leave to File an Amicus Curiae Brief on
Behalf of Respondent-Defendant**

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INDEX

	Page
Motion	1
Appendix A—Letter dated June 8, 1973, to Samuel Hixon III from Robert N. Meals, Jr.	A-1
Appendix B—Letter dated June 8, 1973, to Philip J. Hirschkop from Robert N. Meals, Jr.	A-3

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**For Leave to File an Amicus Curiae Brief on
Behalf of Respondent-Defendant**

COMES NOW, DELTA AIR LINES, INC., through and by its attorney, Dean Booth, and pursuant to Rule 42 of the Supreme Court of the United States, hereby respectfully requests the Court grant leave to file an *amicus curiae* brief on behalf of Chesterfield County School Board, Respondent-Defendant.

Delta Air Lines, Inc. is presently a party-defendant in a Title VII maternity leave sex discrimination action in the United States District Court for the Northern District of Georgia, in Atlanta, captioned **Newmon v. Delta Air Lines, Inc.**, Civil No. 15681 a case which raises a series of important questions about employer maternity leave policies, several of which are identical to those presented in the **Cohen v. Chesterfield County School Board** case. While

Delta Air Lines, Inc. recognizes that **Cohen**, is not a Title VII case, it believes that the major social, medical and economic issues involved in the case are practically the same as those in **Newmon** and it is certain that the outcome of this Court's decision in **Cohen** and its companion case, **Cleveland Board of Education v. La Fleur**, No. 72-777, will strongly influence, if not determine, the future disposition of many of the same questions being raised in Title VII cases. Since this Court's decision will very probably have a significant impact on the maternity leave policies of employers **other than** school boards, especially corporate employers that employ large numbers of women, it is in the public interest that Delta Air Lines, Inc. present its views to the Court on the following issues which it believes may not adequately be presented by the parties:

(1) Whether company regulations which establish mandatory cutoff dates for the commencement of maternity leave are necessary to ensure the efficient functioning of the Employer's business.

(2) Whether the time at which an Employer may permissibly require maternity leave to begin should be allowed to vary from company to company according to factors such as the kind of business the Employer is engaged in, and the different kinds of work required to be performed by the Employer. In the **Newmon** case, Delta required pregnant female employees to go on maternity leave after the fifth month of pregnancy, just as the Chesterfield County School Board did in **Cohen**; Delta believes the underlying justification for its rule is as compelling if not more so, for different reasons, than the rule being challenged in **Cohen**.

(3) Whether or not pregnancy should be viewed as natural condition of the body instead of as an illness, as some proponents of Mrs. Cohen's position are attempting to advance.

(4) Whether pregnancy is voluntary, and if so, whether it is then invalid to compare it to other physical conditions which result from involuntary causes.

(5) Whether the Equal Employment Opportunity Commission's Guidelines on Sex Discrimination, 29 CFR, § 1604 (April 5, 1972), should be entitled to great deference when these interpretations were promulgated without references to any supportive medical or economic data, and without any of the procedural safeguards guaranteed by the concept of Due Process of Law.

Thus, before the Supreme Court fashions a new rule with regard to one particular type of employer (a school board), Delta asks that it be granted permission to present this Court with facts which will demonstrate the different effects of maternity leave policies on other employers, depending on the nature of the business they are engaged in.

Requests for consent to file an *amicus curiae* brief were sent to each party. Copies are attached hereto and made a part thereof. Counsel for Chesterfield County School Board consented by letter dated June 11, 1973, whereas counsel for Susan Cohen orally refused consent on June 22, 1973.

.....
DEAN BOOTH

Attorney for Amicus Curiae,
Delta Air Lines, Inc.

.....
RICHARD S. MAURER

.....
SIDNEY F. DAVIS

Attorneys for Delta Air Lines, Inc., Amicus
Curiae on Behalf of Respondent-Defendant
Chesterfield County School Board



APPENDIX

APPENDIX A

June 8, 1973

Samuel Hixon, III, Esquire
Williams, Mullen & Christian
510 United Virginia Bank Building
Richmond, Virginia 23219

Re: **Cohen v. Chesterfield County School Board**, —
F.2d —, 5 EPD 8419 (4th Cir. 1973), **cert. granted**
41 USLW 3565 (April 24, 1973).

Dear Mr. Hixon:

In accordance with our telephone conversation of one week ago, Delta Air Lines Inc. hereby respectfully requests pursuant to Rule 42 of the Supreme Court of the United States, that you consent to the filing of a brief *amicus curiae* in the above referenced case, now pending before the United States Supreme Court.

Delta Air Lines, Inc. is presently a party-defendant in an important Title VII maternity leave sex discrimination case scheduled for trial in the United States District Court for the Northern District of Georgia, in Atlanta beginning June 25, 1973. The case, **Newmon v. Delta Air Lines, Inc.** presents a number of issues concerning interpretation and application of § 703 of Title VII of the Civil Rights Act of 1964 with regard to employer maternity leave policies. While it is understood **Cohen** is not a Title VII case, it is felt that the major social, economic and medical issues involved in the cases are virtually identical, regardless whether the origin of the action lies in the Constitution or Title VII, and Delta is certain that the outcome of the Supreme Court's decision in **Cohen** will

strongly influence, if not preclude, the similar issues in pending Title VII cases, such as **Newmon**. I am therefore enclosing a copy of our recent brief submitted in support of a Motion for Summary Judgment filed in the District Court here in Atlanta on April 18, 1973, in the **Newmon** case, and hereby offer Delta's assistance in any other aspect of your case as it is prepared for hearing before the Supreme Court.

The Supreme Court Rules state that the filing date for *amicus* briefs is the same deadline as the one for the party on whose behalf the brief is submitted. During our conversation the other day, you indicated that date is about August 5th for Chesterfield County School Board. Could you please confirm the applicable deadline in your reply?


Cordially yours,

Robert N. Meals, Jr.

Attorney for Delta Air Lines, Inc.

RNMjr/ep

Enclosure



APPENDIX B

June 8, 1973

Philip J. Hirschkop, Esquire
108 North Columbus
P. O. Box 234
Alexandria, Virginia 22313

Re: *Cohen v. Chesterfield County School Board*,
— F.2d —, 5 EPD 8419 (4th Cir. 1973), **cert.**
granted 41 USLW 3565 (April 24, 1973).

Dear Mr. Hirschkop:

Pursuant to Rule 42 of the Supreme Court of the United States, Delta Air Lines, Inc. hereby respectfully requests that you consent to the filing of a brief *amicus curiae* in the above-referenced case, now pending before the United States Supreme Court.

Delta Air Lines, Inc. is presently a party-defendant in a Title VII sex discrimination action in the United States District Court for the Northern District of Georgia, in Atlanta, captioned **Newmon v. Delta Air Lines, Inc.**, Civil No. 15681, a case which raises virtually identical issues about employer maternity leave policies as those presented in **Cohen**. While Delta recognizes that **Cohen** is not a Title VII case, it feels that the major social, economic and medical issues involved in the case are practically the same as those in **Newmon**, and it is certain that the outcome of the Supreme Court's decision in **Cohen** will strongly influence, if not determine, the future disposition of the same questions in Title VII cases. Since the Supreme Court's de-

cision may have a significant impact on the maternity leave policies of companies that employ large numbers of women, it is in the public interest that Delta Air Lines, Inc. present its views to the Court.

Cordially yours

Robert N. Meals, Jr.

Attorney for Delta Air Lines, Inc.

RNMjr/ep

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MICHAEL WOSTEE, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1129

SUSAN COHEN, *Petitioner*

v.

CHESTERFIELD COUNTY SCHOOL BOARD
AND DR. ROBERT F. KELLY, *Respondents*.

On Writ of Certiorari to the Court of Appeals for the
Fourth Circuit

BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdictional statement	2
Constitutional provision involved	2
Questions for review	2
Statement of the case	3
Summary of argument	4
Argument:	
I. The challenged mandatory maternity leave rule must be viewed with strict scrutiny as it creates "suspect" or "invidious" classifications	5
A. Involuntary discharge of a teacher solely because she is pregnant constitutes sex discrimination	5
B. Sex-based classifications should now be reorganized to be "suspect" or "invidious" ..	9
II. The mandatory maternity leave rule must be viewed with strict scrutiny as it contravenes fundamental, constitutional or civil rights	16
III. The mandatory maternity leave policy does not serve any compelling governmental interest and constitutes a denial of due process rights	21
IV. These maternity leave rules even lack any rational basis	24
A. Administrative convenience is insufficient to uphold the rule	26
B. A mandatory maternity leave rule does not promote continuity of the educational process	27

	Page
V. Overwhelming authority supports petitioner's position	30
VI. The United States Court of Appeals for the Fourth Circuit, <i>en banc</i> , violated petitioner's constitutionally guaranteed right to due process	35
Conclusion	37

TABLE OF CITATIONS

CASES:

<i>Aiello v. Hansen</i> No. C-72-1402 SW (N.D.Cal. May, 1973)	8
<i>Awadallah v. New Milford Board of Education</i> , (N.J. Dept. Law and Public Safety, Sept. 29, 1971)	32
<i>Belling v. Sharpe</i> , 347 U.S. 497 (1954)	15
<i>Bennett v. Dyer's Chop House</i> , — F.Supp. —, 41 U.S. L.W. 2243 (N.D. Ohio, Oct. 26, 1972)	10
<i>Blair v. New Milford Board of Education</i> , No. EO2ES-5337 (Sup. Ct. Hackensack, N.J., Jan. 20, 1971) ..	32
<i>Bowe v. Colgate-Palmolive Co.</i> , 416 F.2d 711 (7th Cir. 1969)	32
<i>Bradwell v. Illinois</i> , 83 U.S. (16 Wall.) 130 (1873)	9
<i>Bravo v. Board of Education of the City of Chicago</i> , 345 F.Supp. 155 (N.D.Ill. 1972)	7, 23, 26, 30, 36
<i>Bray v. Lee</i> , 337 F.Supp. 934 (D.Mass. 1972)	11
<i>Brenden v. Independent School District</i> , 41 U.S.L.W. 2590 (8th Cir. April 18, 1973)	11
<i>Buckley v. Coyle Public School System</i> , 5 F.E.P. Cases 773 (1973)	7, 30
<i>Bullock v. Carter</i> , 405 U.S. 134 (1972)	12
<i>Butcher's Union v. Crescent City</i> , 111 U.S. 746 (1884). 16-17	
<i>Carruth v. Avila</i> , Civil No. 237272 (Super.Ct.Ariz., October 26, 1971)	8
<i>Cedar Rapids Community School District and Cedar Rapids Board of Education v. Parr</i> , No. 97858 (Dist.Ct. of Iowa, Linn County, May 25, 1973) ..	8
<i>Cohen v. Chesterfield County School Board</i> , 326 F. Supp. 1159 (E.D.Va. 1971) reversed, 474 F.2d 395 (1973)	1, 2, 5, 8, 9, 10, 21, 28
<i>Diaz v. Pan American World Airways, Inc.</i> , 442 F.2d 385 (5th Cir. 1971)	32

Table of Contents Continued

iii

	Page
<i>Dunn v. Blumstein</i> , 405 U.S. 330 (1972)	12
<i>Eisenstadt v. Baird</i> , 405 U.S. 438 (1972)	20
<i>Eslinger v. Thomas</i> , — F.2d —, (4th Cir. March 28, 1973)	11
<i>Flo v. General Electric Company</i> , 195 N.Y.2d 652 (1959)	33
<i>Frontiero v. Richardson</i> , 41 U.S.L.W. 4609 (U.S.Sup. Ct. May 14, 1973)	4, 13-14, 14-15, 15, 21, 24, 27, 31
<i>Garner v. Stephens</i> , Civil No. 6855 (W.D.Ky., December 1, 1972)	8, 30, 36
<i>Goesaert v. Cleary</i> , 335 U.S. 464 (1948)	10
<i>Green v. Waterford Board of Education</i> , 473 F.2d 629 (2nd Cir. 1973)	7, 11, 26, 29, 30, 36
<i>Griggs v. Duke Power Company</i> , 401 U.S. 424 (1971)	18, 31
<i>Griswold v. Connecticut</i> , 381 U.S. 478 (1965)	20
<i>Harper v. Virginia State Board of Elections</i> , 383 U.S. 663 (1966)	16
<i>Heath v. Westerville Board of Education</i> , 345 F.Supp. 501 (S.D.Ohio 1972)	7, 11, 23, 26, 30, 36
<i>James, Judicial Administrator, et al. v. Strange</i> , 407 U.S. 128 (1972)	29
<i>Johnson v. Branch</i> , 364 F.2d 177 (4th Cir. 1966)	22
<i>Kober v. Westinghouse Electric Corp.</i> , 325 F.Supp. 467 (W.D.Pa. 1971)	32
<i>Korematsu v. United States</i> , 320 U.S. 214 (1944)	15
<i>LaFleur v. Cleveland Board of Education</i> , 326 F.Supp. 1208 (N.D.Ohio, 1971), reversed, 465 F.2d 1184 (6th Cir. 1972)	7, 11, 18, 26, 30, 36
<i>Lamb v. Brown</i> , 456 F.2d 18 (10th Cir. 1972)	11
<i>Loving v. Virginia</i> , 388 U.S. 1 (1967)	15, 20
<i>Matter of Patricia A.</i> , 31 N.Y.3d 83, 335 N.Y.S.2d 33 (1972)	7, 11
<i>McLaughlin v. Florida</i> , 379 U.S. 184 (1964)	15, 16
<i>Middletown Board of Education</i> (arbitrator's decision) 56 L.A. 830 (1971)	33
<i>Monell v. Department of Social Services</i> , 4 E.P.D. 5936 (S.D.N.Y. 1972)	30, 36
<i>Moritz v. Commissioner</i> , 469 F.2d 466 (10th Cir. 1972)	11
<i>Muller v. Oregon</i> , 208 U.S. 412 (1908)	10, 17
<i>Phillips v. Martin-Marietta Corporation</i> , 416 F.2d 1257 (5th Cir. 1969), vacated and remanded 400 U.S. 542 (1971)	7

	Page
<i>Pocklington v. Duval County School Board</i> , 345 F.Supp. 163 (M.D.Fla. 1972)	8, 23, 24, 30, 36
<i>Police Department v. Mosely</i> , 408 U.S. 92 (1972)	12
<i>Reed v. Nebraska School Activities Ass'n.</i> , 341 F.Supp. 258 (D.Neb. 1972)	11
<i>Reed v. Reed</i> , 404 U.S. 71 (1971)	4, 11, 12, 13, 21, 24, 27
<i>Ridinger v. General Motors Corp.</i> , 325 F.Supp. 1089 (S.D.Ohio 1971)	32
<i>Robinson v. Rand</i> , 340 F.Supp. 37 (D.Colo. 1972) ..	11, 26, 33
<i>Roe v. Wade</i> , — U.S. —, 35 L.2d 147 (1973)	20-21
<i>Rosenfeld v. Southern Pacific Co.</i> , 444 F.2d 1219 (9th Cir. 1971)	32
<i>Royster (F.S.)Guano Company v. Virginia</i> , 253 U.S. 412 (1920)	24-25
<i>Sail'er Inn, Inc. v. Kirby</i> , 5 Cal.3d 1, 485 P.2d 529 (1971)	10, 13
<i>Schattman v. Texas Employment Commission</i> , 330 F. Supp. 328 (W.D. Tex. 1971), reversed, 459 F.2d 32 (5th Cir. 1972), cert. denied, 41 U.S.L.W. 3372 (Jan. 8, 1973)	6, 8
<i>Seidenberg v. McSorleys' Old Ale House</i> , 317 F.Supp. 593 (S.D.N.Y. 1970)	10
<i>Shuff v. Columbus Municipal Separate School District</i> , 338 F.Supp 1376 (N.D.Miss. 1972)	11
<i>Skinner v. Oklahoma ex. rel. Williamson</i> , 316 U.S. 535 (1942)	20
<i>Southgate Educational Association and Board of Edu- cation of Southgate Community School District</i> , AAA Case No. 5439-0323071 (Aug. 3, 1971)	33
<i>Sprogis v. United Air Lines, Inc.</i> , 444 F.2d 1194 (7th Cir. 1971), cert. denied, 92 S.Ct. 536	6, 32
<i>Stanley v. Illinois</i> , 405 U.S. 645 (1972)	21, 24, 26-27
<i>State v. Bearcub</i> , 465 P.2d 252 (Ore.Ct.App. 1970) ..	10
<i>State v. Heitman</i> , 105 Kan. 139, 181 P. 630 (1919) ...	10
<i>State Division of Human Rights v. Board of Education of Union Free School District No. 22</i> , Case Nos. CS-21025-70, et seq., (June 29, 1971)	32
<i>Struck v. Secretary of Defense</i> , 460 F.2d 1372 (9th Cir. 1971)	33
<i>Tavern & Grill Owners Ass'n v. Borough of Haw- thorne</i> , 57 N.J. 180, 270 A.2d 628 (1970)	10
<i>Tecumseh Products Co. v. Wisconsin Employment Re- lations Board</i> , 126 N.W.2d 520 (1959)	33

Table of Contents Continued

v

Page

<i>Truax v. Edmonds School District #15</i> , Dkt. #107915 (Superior Ct. Snohomish County, Wash., August, 1971)	33
<i>Truax v. Raich</i> , 239 U.S. 33 (1915)	17
<i>United States v. Dege</i> , 364 U.S. 51 (1960)	11
<i>Weber v. Aetna Casualty & Surety Company</i> , 406 U.S. 164 (1972)	12
<i>Williams v. San Francisco Unified School District</i> , 340 F.Supp. 438 (N.D.Cal. 1972)	7-8, 11, 26, 29, 30, 36

CONSTITUTIONS, STATUTES, REGULATIONS. ORDERS:

U.S. Constitution, Art. IV, § 2	9
U.S. Constitution, Amendment XIV, § 1	2
U.S. Constitution, Proposed Amendment XXVII, § 1 (Equal Rights Amendment)	31
28 U.S.C. § 1254(1)	2
42 U.S.C. § 2000e	33
42 U.S.C. § 2000e(b)	30
42 U.S.C. § 2000e-1	30-31
Equal Employment Opportunity Act of 1972, P.L. 92- 261, 92nd Cong., H.R. 1746	31, 33, 36
Federal Rules of Appellate Procedure 35	35
Federal Rules of Appellate Procedure 40	35
29 C.F.R. § 1604.10(a), (b)	31
41 C.F.R. § 60-20.3(g)	34
Executive Order 11246	33
22 Code of Virginia § 217.5	22
Wisconsin Administrative Code § 88.20	33

MISCELLANEOUS:

Address by Jacqueline G. Gutwillig to the Conference of Interstate Association of Commissions on the Status of Women in St. Louis, June 18, 1971	18
Citizen's Advisory Council on the Status of Women, U.S. Dept. of Labor, <i>Statement of Principles</i>	34
Crozier, <i>Constitutionality of Diserimination Based on Sex</i> , 15 B.U.L. Rev. 723 (1935).	15-16

	Page
Curran, <i>Equal Protection of the Law: Pregnant School Teachers</i> , 285 <i>New England J. Med.</i> 336 (1971) ..	19
Eastwood, <i>The Double Standard of Justice: Women's Rights Under the Constitution</i> , 5 <i>Val.L.Rev.</i> 281 (1971)	16
Gunther, <i>In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection</i> , 86 <i>Harv.L.Rev.</i> 1 (1972)	11, 12, 29
Johnston & Knapp, <i>Sex Discrimination by Law: A Study in Judicial Perspective</i> , 46 <i>N.Y.U.L.Rev.</i> 675 (1971)	16
Koontz, <i>Childbirth and Child Rearing Leave: Job-Related Benefits</i> , 17 <i>N.Y.L.F.</i> 480 (1970)	18
Love's <i>Labors Lost: New Conceptions of Maternity Leaves</i> , 7 <i>Harv.Civ.Rts.Civ.Libs.L.Rev.</i> 260 (1972)	18, 19
Note, 84 <i>Harv.L.Rev.</i> 1499 (1971)	16
Note, 86 <i>Harv.L.Rev.</i> 568 (1973)	11
Note, <i>Are Sex-Based Classifications Constitutionally Suspect?</i> , 66 <i>Nw.U.L.Rev.</i> 481 (1971)	16
Note, <i>Fair Employment—Is Pregnancy Alone a Sufficient Reason for Dismissal of a Public Employee?</i> , 52 <i>B.U.L.Rev.</i> 196 (1972)	16
President's Commission on the Status of Women, <i>Report of the Committee on Civil and Political Rights</i> , 1963	34
President's Commission on the Status of Women, <i>Report of the Committee on Social Insurance and Taxes</i> , Oct. 1963	34
Testimony of Andre E. Hellegers, before the Federal Communications Commission, Dec. 1, 1971. In the Matter of Petitions filed by the E.E.O.C., et al., Docket No. 19143	19
Wilkes, <i>Memorandum</i> , Dept. of Labor, Nov. 1970	34
Women's Bureau, U.S. Dept. of Labor, <i>Fact Sheet on the American Family in Poverty</i> , 1970	17
Women's Bureau, Employment Standards Administration, U.S. Dept. of Labor, <i>Why Women Work</i> , July 1972	17

IN THE
Supreme Court of the United States
OCTOBER TERM, 1972

No. 72-1129

SUSAN COHEN, *Petitioner*

v.

CHESTERFIELD COUNTY SCHOOL BOARD
AND DR. ROBERT F. KELLY, *Respondents*.

On Writ of Certiorari to the Court of Appeals for the
Fourth Circuit

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported in 474 F.2d 395 (1973). The opinion of the United States Court of Appeals for the Fourth Circuit initially affirming the judgment of the United States District Court for the Eastern District of Virginia, Richmond Division, is

still unreported but appears at page 1a of the Appendix. The decision of the United States District Court for the Eastern District of Virginia, Alexandria Division is reported at 326 F. Supp. 1159 (E.D.Va. 1971).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on September 14, 1972. On September 20, 1972 respondents filed their Petition for Rehearing and Suggestion for rehearing *en banc*, which Petition and Suggestion were accepted on January 2, 1973. The judgment of the United States Court of Appeals for the Fourth Circuit, *en banc*, was entered on January 15, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV, Sec. 1

“ . . . , nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

QUESTIONS FOR REVIEW

Does a policy which requires female teachers to resign after the fifth month of pregnancy constitute an arbitrary and invidious sex classification in violation of the due process and equal protection clauses of the Fourteenth Amendment?

Did the United States Court of Appeals for the Fourth Circuit commit error in granting respondents' Petition and Suggestion for Rehearing *en banc* and in rendering judgment without requesting or permitting

petitioner the right to submit briefs and present argument on her behalf?

STATEMENT OF THE CASE

Petitioner, Susan Cohen, was employed by the School Board of Chesterfield County, Virginia, as a Senior Government teacher from September 1968 to December 1970, under standard employment contracts. (A. 13) On or about November 2, 1970, Mrs. Cohen informed the School Board that she was pregnant and her estimated due date was April 28, 1971.¹ She requested that she be given maternity leave effective April 1, 1971 and presented a letter from her gynecologist stating that she could continue working as long as she chose. (A. 21) Pursuant to the School Board's maternity leave regulations (A. 20-21),² Mrs. Cohen was informed by school authorities on November 6, 1970, that her request had been denied by the School Board and her employment would be terminated as of December 18, 1970. (A. 13)

On November 25, 1970, petitioner personally appeared before the School Board to request that she be allowed to teach until April 1, 1971, or at least until the end of the first semester on January 21, 1971. She presented a letter from her principal Mr. John R. Kopko recommending that she be allowed to teach until January 21, 1971 (A. 97) which was denied.

¹ On May 2, 1971, Mrs. Cohen gave birth to a son.

² Termination of employment of an expectant mother shall become effective at least four (4) months prior to the expected birth of the child. Termination of employment may be extended if the superintendent receives written recommendations from the expectant mother's physician and her principal, and if the superintendent feels that an extension will be in the best interest of the pupils and school involved.

Upon deposition, the five members of the School Board assigned varied reasons for the existence of a maternity leave policy incorporating a five month rule. Three members of the Board and the Superintendent believed that the rate of absenteeism of a teacher increases in the last four months of pregnancy. (A. 39, 44, 48, 58, 106) The Superintendent and three members felt that it would be dangerous for a pregnant woman to walk down school halls and climb steps. (A. 45, 48-49, 56, 60, 61) Three members of the School Board felt that it was not good for the students to see women whose pregnancy becomes conspicuous to others, (A. 42, 53-54, 56) including one member who stated, "because some of the kids say, my teacher swallowed a watermelon, things like that. That is not good for the school system." (A. 54)

At trial, Dr. Kelly, the Superintendent, for the first time suggested that the main reason for the maternity leave regulation is to foster "continuity of teaching" by giving the School Board advance notice to secure replacement teachers. (A. 109, 112, 113) He maintained that the students suffer when there is an interruption of the teaching process between the continuity of the teaching from one teacher to a substitute teacher. (A. 128)

SUMMARY OF ARGUMENT

Petitioner asserts that mandatory maternity leave policies discriminate on the basis of sex. In light of this Court's recent decisions in *Reed v. Reed*, 404 U.S. 71 (1971) and *Frontiero v. Richardson*, — U.S. —, 41 U.S.L.W. 4609 (May 14, 1973), these regulations should be treated as invidious discrimination—based on suspect classifications—interfering with funda-

mental rights and must be measured by some compelling state interest rather than mere rational basis. Additionally petitioner contends that these regulations are so arbitrary in light of the due process clause as to not even survive a rational basis test.

ARGUMENT

I. THE CHALLENGED MANDATORY MATERNITY LEAVE RULE MUST BE VIEWED WITH STRICT SCRUTINY AS IT CREATES "SUSPECT" OR "INVIDIOUS" CLASSIFICATIONS

A. Involuntary Discharge of a Teacher Solely Because She Is Pregnant Constitutes Sex Discrimination

The issue in this case devolves to whether adverse treatment of women based on a physical condition unique to women constitutes sex discrimination. The majority of the Fourth Circuit Court of Appeals stated that sex discrimination is "found in situations in which the sexes are in actual or potential competition" and distinguished the case at bar because "[T]he fact that only women experience pregnancy and motherhood removes all possibility of competition between the sexes in this area." *Cohen v. Chesterfield County School Board*, 474 F.2d 395, 397 (1973).

The majority attempts to distinguish maternity leave from leave due to other temporary disabilities on the basis of the uniqueness of pregnancy to women. While the respondents created a maternity leave policy directed toward all female teachers who became pregnant, they maintained a general sick leave policy applicable to all other teacher absences due to physical disorders or disabilities. In the employment context, pregnancy is treated on a generic basis imposing similar requirements on all pregnant teachers regardless of their individual differences or abilities while other

disabilities are treated under sick leave on an individual basis depending on the individual teacher's ability to function in the classroom. The maternity leave policy requires advance notice of the absence and requires mandatory leave of absence; the general sick leave regulations contain neither requirement. The maternity leave policy deprives the pregnant teacher from continuing to be employed until such time as both she and her doctor deem it in her best interests to stop working. It deprives her of an opportunity to use her accrued sick leave during her absence. It requires her to remain out of work until the following school year, returning then only with permission from her doctor.

Sex discrimination has been held to exist when all or a defined class of women are subjected to disadvantaged treatment based on *stereotypical assumptions* about their sex which operate to foreclose opportunity based on individual merit. "Discrimination is not to be tolerated under the guise of physical properties possessed by one sex." *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971). Nor is discrimination tolerable when its impact concentrates on a portion of the protected class. *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542 (1971).

A regulation designed to restrict the employment rights of pregnant teachers can only be viewed as a regulation which restricts the employment rights of women as a sex. As stated by Judge Wisdom, dissenting in *Schattman v. Texas Employment Commission*, 459 F.2d 32 (5th Cir. 1972), "Female employees are the only employees . . . who become pregnant; it follows that they are provisionally dismissed from work on account of their sex" 459 F.2d at 42. Chief

Judge Brown, dissenting in *Phillips v. Martin-Marietta Corporation*, 416 F.2d 1257, 1259 (5th Cir. 1969), a case in which an employer who was willing to hire men with pre-school age children for certain positions, but not women, held a similar view: "Nobody—and this includes Judges, Solomonic or life tenured—has yet seen a male mother. A mother, to oversimplify the simplest biology, must be a woman."

The Second Circuit, confronted with facts similar to those of the instant case observed, "Why the Board should choose, by means of an inflexible rule, to manifest particular concern with the health of a pregnant woman, but not, for example, with the health of a teacher (male or female) recuperating from a heart attack is nowhere explained." *Green v. Waterford Board of Education*, 473 F.2d 629 (2nd Cir., 1973).

The Sixth Circuit also facing a case involving a mandatory maternity leave of absence noted, "Here, too, we deal with a rule which is inherently based upon a classification by sex. Male teachers are not subject to pregnancy, but they are subject to many types of illnesses and disabilities." *La Fleur v. Cleveland Board of Education*, 465 F.2d 1184 (6th Cir., 1972). Similarly the Tenth Circuit concluded that a mandatory maternity leave "penalizes the feminine school teacher for being a woman" *Buckley v. Coyle Public School System*, 5 F.E.P. Cases 773, 774 (1973).

A spate of district court decisions have concurred. *Bravo v. Board of Education of the City of Chicago*, 345 F. Supp. 155 (N.D.Ill. 1972); *Heath v. Westerville Board of Education*, 345 F. Supp. 501, 505 (S.D. Ohio 1972); *Williams v. San Francisco Unified School Dis-*

trict, 340 F.Supp. 438, 443 (N.D. Cal. 1972); *Pocklington v. Duval County School Board*, 345 F. Supp. 163 (M.D. Fla. 1972); *Schattman v. Texas Employment Commission*, 330 F. Supp. 328 (W.D. Tex. 1971), reversed on other grounds, 459 F.2d 32 (5th Cir. 1972), cert. denied, 41 U.S.L.W. 3372 (January 8, 1973); *Garner v. Stephens*, Civil No. 6855 (W.D. Ky., filed December 1, 1972). In *Aiello v. Hansen*, No. C-72-1402 SW (N.D. Cal. filed May, 1973), the California Unemployment Insurance Code provision which exempted pregnancy-related work loss from the coverage of the state disability insurance program was found to discriminate against women.

State courts have similarly held that a mandatory maternity leave policy is discriminatory towards women teachers. See *Cedar Rapids Community School District and Cedar Rapids Board of Education v. Parr*, No. 97858 (Dist. Ct. of Iowa, Linn County, filed May 25, 1973); *Carruth v. Avila*, Civil No. 237272 (Super. Ct. Ariz., filed October 26, 1971).

The Court below erred in relying upon the reasoning that "[a]s planning precedes most pregnancies, planning for the arrangements they necessitate may go hand in hand with them. That circumstances supplies the justification for the rule that puts the starting of maternity leave . . . within the control of school officials rather than in that of each pregnant teacher." *Cohen, supra*, at 398.

Instead, the Fourth Circuit should have ruled that a state agency, consistent with constitutional requirements of due process and equal protection, may not rely upon a group stereotype to disregard individual circumstances when the physical condition is preg-

nancy while it deals with all other physical conditions on the basis of individual differences.

Petitioner asks that this Court merely recognize the premise as stated by Circuit Judge Winter in dissent, "That the [pregnancy discharge] regulation is a discrimination based on sex, we think is self-evident." *Cohen, supra*, at 400.

B. Sex-Based Classifications Should Now Be Recognized To Be "Suspect" or "Invidious"

The past one hundred years have seen decisions which have impelled women to accept a dependent, subordinate status in society. In 1873, this Court in *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, ruled that the right of a woman to practice law was to be nowhere found in either the privileges and immunities clause of Article IV, Section 2 of the Constitution, nor the privileges and immunities clause of the Fourteenth Amendment. Justice Bradley, concurring with the majority, found it even unnecessary to focus upon the U.S. Constitution, relying on "divine ordinance" instead:

Man is, or should be woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and function of womanhood. . . .

The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. 83 U.S. (16 Wall.) at 141.

"The law of the Creator" continued to be a dominant theme in decisions justifying laws establishing sex-based classifications. See, *State v. Heitman*, 105 Kan. 139, 146-147, 181 P. 630, 633-634 (1919); *State v. Bearcub*, 465 P.2d 252, 253 (Ore. Ct. App. 1970); *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948). The Court below apparently subscribed to this theme in holding:

The fact that only women experience pregnancy and motherhood removes all possibility of competition between the sexes in this area. No man-made law or regulation excludes males from those experiences, and no such laws or regulations can relieve females from all of the burdens which naturally accompany the joys and blessings of motherhood. *Cohen, supra*, at 397.

Only twenty-five years ago, this Court in *Goesaert v. Cleary, supra*, upheld a Michigan statute which although permitting women to serve as waitresses in taverns barred them from the more lucrative employment as bartenders. In contrast to the protective motive apparently present in *Muller v. Oregon*, 208 U.S. 412 (1908), the actual motivation behind the statute in *Goesaert* was said by the appellant to be "an unchivalrous desire of male bartenders to try to monopolize the calling." 335 U.S. at 467.

More recently jurists in federal and state courts have found *Goesaert* a burden and an embarrassment. See *Sail'er Inn, Inc. v. Kirby*, 5 Cal.3d 1, 485 P.2d 529 (1971); *Tavern & Grill Owners Ass'n v. Borough of Hawthorne*, 57 N.J. 180, 270 A.2d 628 (1970); *Seidenberg v. McSorleys' Old Ale House*, 317 F.Supp. 593 (S.D.N.Y. 1970); *Bennett v. Dyer's Chop House*, — F. Supp. —, 41 U.S.L.W. 2243 (N.D. Ohio, October 26, 1972).

Indeed, in *United States v. Dege*, 364 U.S. 51 (1960), this Court refused to rely on "ancient doctrine" concerning the status of women. The Court declared, "we . . . do not allow ourselves to be obfuscated by medieval views regarding the legal status of women," and rejected precedent from an earlier age expressing a view of womanhood "offensive to the ethos of our society." 364 U.S. at 52, 53.

In 1971, a new direction was signalled by this Court. In *Reed v. Reed*, 404 U.S. 71, the Court invalidated an Idaho statute that gave a preference to men over women for appointment as estate administrators. In *Reed*, this Court observed that the statute allows "different treatment [to] be accorded to the applicants on the basis of their sex: it thus establishes a classification subject to scrutiny under the Equal Protection Clause." 404 U.S. at 75. *Reed* was interpreted by courts³ and commentators⁴ as a harbinger of fundamental change in this Court's perspective with regard

³ See *Eslinger v. Thomas*, — F.2d — (4th Cir. March 28, 1973); *Brenden v. Independent School District*, 41 U.S. L.W. 2590 (8th Cir. April 18, 1973); *Green v. Waterford Board of Education*, 473 F.2d 629 (2d Cir. January 29, 1973); *Moritz v. Commissioner*, 469 F.2d 466 (10th Cir. 1972); *Lamb v. Brown*, 456 F.2d 18 (10th Cir. 1972); *LaFleur v. Cleveland Board of Education*, 465 F.2d 1184 (6th Cir. 1972); *Williams v. San Francisco Unified School District*, 340 F.Supp. 438 (N.D. Cal. 1972); *Heath v. Westerville Board of Education*, 345 F.Supp. 501 (S.D. Ohio 1972); *Robinson v. Rand*, 340 F.Supp. 37 (D.Colo. 1972); *Bray v. Lee*, 337 F.Supp. 934 (D.Mass. 1972); *Shuff v. Columbus Municipal Separate School District*, 338 F.Supp. 1376 (N.D.Miss. 1972); *Reed v. Nebraska School Activities Ass'n*, 341 F.Supp. 258 (D.Neb. 1972); *Matter of Patricia A.*, 31 N.Y.3d 83, 335 N.Y.S.2d 33 (1972).

⁴ Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv.L.Rev. 1, 34 (1972); Note, 86 Harv.L.Rev. 568, 583-88 (1973).

to sex-based classifications. It was apparent that the Court had modified the traditional distinctions between the "rational basis" and "compelling interest" equal protection tests.

Recent decisions of this Court have made it abundantly clear that rational basis scrutiny is not so deferential a standard of review as had been previously supposed. The Court has apparently moved towards a reconciliation of the two standards by posing certain fundamental inquiries applicable to "all" equal protection claims. See Gunther, *The Supreme Court, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 17 (1972). Thus, in *Weber v. Aetna Casualty & Surety Company*, 406 U.S. 164, 173 (1972), the Court declared that the "essential inquiry" in all equal protection cases is "inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?" And in *Police Department v. Mosely*, 408 U.S. 92, 95 (1972), the Court stated: "As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." See *Reed v. Reed*, *supra*; *Weber v. Aetna Casualty & Surety Company*, 406 U.S. 164 (1972); *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972); *Bullock v. Carter*, 405 U.S. 134, 144 (1972).

The analysis in *Reed* led to a critically significant conclusion with respect to institutional discrimination on the basis of sex. Recognizing that the governmental interest urged in support of the Idaho statute was "not without some legitimacy," 404 U.S. at 76, the

Court nonetheless found the legislation constitutionally infirm because it provided "dissimilar treatment for men and women who are similarly situated." 404 U.S. at 77.

Accordingly sex-based classifications are now subject to "scrutiny," a measure previously used in race discrimination cases where the "compelling interest" standard was required. Previously the California Supreme Court, in *Sail'er Inn, Inc. v. Kirby*, 5 Cal.3d 1, 485 P.2d 529 (1971), held that:

What differentiates sex from nonsuspect statuses, such as intelligence or physical disability, and aligns it with recognized suspect classifications, is that the characteristic frequently bears no relation to ability to perform or contribute to society. . . . The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members

Laws which disable women from full participation in the political, business and economic arenas are often characterized as "protective" and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon close inspection, been revealed as a cage. We conclude that the sexual classifications are properly treated as suspect, particularly when those classifications are made with respect to a fundamental interest such as employment. 5 Cal.3d at 18-20, 485 P.2d at 540-41.

On May 14, 1973, in *Frontiero v. Richardson*, 41 U.S. L.W. 4609, this Court recognized the inherent flaw in

governmental schemes that accord different treatment to males and females solely on the basis of their sex:

since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, *the imposition of special disabilities upon the member of a particular sex because of their sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility.* And what differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria is that the sex characteristic frequently bears no relation to ability to perform or to contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members. 41 U.S. L.W. at 4612 (emphasis added).

The judgment of the Court in *Frontiero* invalidated a fringe benefit scheme that awarded male members of the military housing allowances and medical care for their wives, regardless of dependency, but authorized benefits for female members of the military only if they in fact supported their husbands. The message of *Frontiero* is clear: persons similarly situated, whether male or female, must be accorded even-handed treatment by the law. Legislative classifications may legitimately take account of need or ability; they may not be premised on unalterable sex characteristics that bear no necessary relationship to an individual's need, ability or life situation.

The plurality opinion in *Frontiero*, delivered by Justice Brennan, declares with unmistakable clarity that

"classifications based upon sex, like classifications based on race, alienage or national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny." (emphasis added) Justice Stewart, concurring in the judgment, preferred to label the discrimination "invidious." Under either standard maternity leave policies are unconstitutional.

It is well settled that legal restrictions which curtail the civil rights of a group by dint of an immediately suspect classification must be subjected to the most rigid scrutiny of the courts. *Korematsu v. United States*, 320 U.S. 214, 216 (1944). See, e.g., *Belling v. Sharpe*, 347 U.S. 497, 499 (1954); *McLaughlin v. Florida*, 379 U.S. 184, 186 (1964); *Loving v. Virginia*, 388 U.S. 1, 11 (1967). Accordingly, such regulations may be upheld only if they are *necessary*, and *not merely rationally related* to, the accomplishment of a permissible state policy. *McLaughlin v. Florida*, 379 U.S. at 196. Thus, in *Frontiero*, all of the eight Justices who found the fringe benefit scheme to be unconstitutional, rejected pleas of "administrative convenience" as sufficient justification for dissimilar treatment of men and women.

It is plain that petitioner's claims, when exposed to the type of judicial review required by *Frontiero*, must prevail. The burden imposed on defendants to justify the sex-based classification must be severe.

✓ It is difficult to reconcile governmental regulations classifying persons by the permanent class of their birth with the guiding principle of our form of government that "all men are created equal." Therefore, it has been reasoned, that sex, race, national origin, and legitimacy must all be suspect classifications. See Crozier, *Constitutionality of Discrimination Based on*

Sex, 15 B.U.L. Rev. 723, 727-28 (1935); Eastwood, *The Double Standard of Justice: Women's Rights Under the Constitution*, 5 Val. L. Rev. 281, 296-97 (1971); Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. Rev. 675, 738-41 (1971); Note, *Are Sex-Based Classifications Constitutionally Suspect?*, 66 Nw.U. L. Rev. 481 (1971); Note, 84 Harv. L. Rev. 1499 (1971); Note, *Fair Employment—Is Pregnancy Alone a Sufficient Reason for Dismissal of a Public Employee?*, 52 B.U. L. Rev. 196 (1972).

II. THE MANDATORY MATERNITY LEAVE RULE MUST BE VIEWED WITH STRICT SCRUTINY AS IT CONTRAVENES FUNDAMENTAL CONSTITUTIONAL OR CIVIL RIGHTS.

Where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966). A regulation which trenches upon the constitutionally protected freedom from invidious official discrimination, based upon a suspect classification, bears a heavy burden of justification and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy. *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964). The respondent school board has contravened both petitioner's right to work at her chosen profession and her right to bear children. Petitioner contends that stringent judicial scrutiny is appropriate in this case.

Since 1884, in the holding in *Butcher's Union v. Crescent City*, 111 U.S. 746 (1884), the Supreme Court has declared that the right "to follow any of the common occupations of life is an inalienable right . . .

formulated in the Declaration of Independence . . . a large ingredient of the civil liberty of the citizen." This holding was affirmed and expounded upon in *Truax v. Raich*, 239 U.S. 33, 41 (1915).

It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.

Mandatory discharge, or forced leave without pay, insures that a woman will not be an "equal competitor with her brother,"⁵ for it deprives her of experience at work or training during pregnancy, and under some regulations, for a prolonged period thereafter. The "protection" afforded by a regulation denying pregnant teachers the opportunity to work is at best, superfluous, but most often, harmful. It deprives pregnant women of the protection they most need: protection of their right to work and support themselves, and in many cases, their families as well.⁶

The full impact and import of this discrimination is made most poignant by the fact that many pregnant women who are forced to leave employment while they are still capable of work, are women who live in poverty. Some are the principal providers in a family where the husband is unemployed; others are not married or are separated. A woman dismissed from a desk job because of pregnancy may be found ineligible for unemployment compensation because of her con-

⁵ *Muller v. Oregon*, 208 U.S. 412, 422 (1908).

⁶ The employment of women family heads lifts many such families out of poverty. Fact Sheet on the American Family in Poverty, Women's Bureau, U.S. Department of Labor (1970).

dition and may resort to a more strenuous job in order to provide for herself and her children. Even where the husbands are present and employed, the wives' earnings frequently are necessary to keep the family above a bare subsistence level.⁷

The adverse treatment accorded women, particularly women teachers, due to their unique childbearing capacity has been the prime obstacle to their search for equal opportunity. See *Love's Labors Lost: New Conceptions of Maternity Leaves*, 7 Harv. Civ. Rts. Civ. Libs. L. Rev. 260 (1972). Summary dismissal of, or forced, unpaid leave for pregnant women, still widespread and until very recently the common pattern,⁸ continues to be rationalized as "protective." See *LaFleur v. Cleveland Board of Education*, 326 F. Supp. 1208 (N.D. Ohio 1971), *reversed*, 465 F.2d 1184 (6th Cir. 1972), *cert. granted*, April 23, 1973, — U.S. — (1973) (No. 72-777, October Term, 1972). Such disingenious regulations function as "built-in headwinds"⁹ to women's opportunities and as flagrant

⁷ The 4.2 million married women workers whose husbands had incomes below \$5,000 in 1970 almost certainly worked because of economic need. This is probably true of the 3.2 million women whose husbands had incomes between \$5,000 and \$7,000. The majority of the estimated 33 million women in the labor force do not have the option of working solely for personal fulfillment. Figures extracted from *Why Women Work*, Women's Bureau, Employment Standards Administration, U.S. Dept. of Labor (July 1972).

⁸ See Address by Jacqueline G. Gutwillig, Chairman of the Citizens' Advisory Council on the Status of Women, at the Conference of Interstate Association of Commissions on the Status of Women, in St. Louis, June 18, 1971; Koontz, *Childbirth and Child Rearing Leave: Job-Related Benefits*, 17 N.Y.L.F. 480 (1970).

⁹ *Griggs v. Duke Power Company*, 401 U.S. 424, 432 (1971) (impact of testing on blacks).

invasions of their right to pursue their chosen professions.

Unquestionably, as petitioner's experience exemplifies (see Plaintiff's Exhibit No. 6 (A. 21)) many women are capable of working effectively during pregnancy and require only a brief period of absence immediately before and after childbirth. See *Love's Labors Lost: New Conceptions of Maternity Leaves*, *supra*, at 262 n. 11; Curran, *Equal Protection of the Law: Pregnant School Teachers*, 285 New England J. Md. 336 (1971).¹⁰

In sum, the genre of rules in question often impose a disability upon the woman which far exceeds any disability inherent in her pregnancy. These regulations, rationalized under the guise of "benign protection", strike directly and cruelly at a fundamental constitutional and civil right . . . the right to pursue one's chosen profession free of unwarranted governmental interference.

Further, by requiring her to choose between employment and pregnancy, the mandatory leave rule trespasses upon petitioner's, and the working women's right to privacy. This alone is sufficient to invoke the more exacting standard of strict scrutiny under an equal protection analysis.

¹⁰ See Testimony of Andre E. Hellegers, Professor of Obstetrics—Gynecology, Professor of Physiology-Biophysics and Director of Population Research at Georgetown University, before the Federal Communications Commission, December 1, 1971. In the Matter of Petitions filed by the Equal Employment Opportunity Commission, et al., Docket No. 19143: "It is of some significance that women doctors and nurses, who are working on the obstetrical and other services at the hospital, often continue working right up to the day of delivery. This, of course, would not be so if the medical profession thought that working in pregnancy was contraindicated."

This Court has recognized the interest in the marital relationship and its important procreative function as coming within the ambit of Fourteenth Amendment protection:

We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. *Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535, 541 (1942).

Similarly, the Court in striking down the Virginia miscegenation statute as violative of due process, recognized the freedom to marry as "one of the vital rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia*, 388 U.S. 1, 5 (1967). A Connecticut law prohibiting the use of contraceptives was likewise invalidated because it interfered with "a right of privacy older than the Bill of Rights, older than our political parties, older than our school system." *Griswold v. Connecticut*, 381 U.S. 478, 481 (1965).

The constitutional grounding of those fundamental interests was illuminated in *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), as this Court concluded:

If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. (Emphasis original).

This Court has even more recently held that the right to privacy, founded upon the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, is broad enough to encompass a woman's deci-

sion whether or not to terminate her pregnancy. Moreover, from and after the end of the first trimester of pregnancy, a state may regulate the abortion procedure only to the extent that the regulation reasonably relates to the preservation and protection of material health. *Roe v. Wade*, — U.S. —, 35 L.Ed.2d 147 (1973).

III. THE MANDATORY MATERNITY LEAVE POLICY DOES NOT SERVE ANY COMPELLING GOVERNMENTAL INTEREST AND CONSTITUTES A DENIAL OF DUE PROCESS RIGHTS

The resemblance between the regulation challenged in this case and the statutes involved in *Frontiero* and *Reed* is apparent. All three purport to serve the end of administrative convenience. Yet, administrative convenience was precisely the rationale for sex-based classification held insufficient in *Frontiero* and *Reed*:

[A]lthough efficacious administration of governmental programs is not without some importance, 'the constitution recognizes higher values than speed and efficiency.' *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) [In] the realm of 'strict judicial scrutiny' . . . any statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution]' *Reed v. Reed*, *supra*, at 76, 77. *Frontiero*, *supra*, at 4613. See also *Green*, *supra*, at 635.

The respondents have utterly failed to provide any tenable administrative justification for the regulation,¹¹

¹¹ See Judge Merhige's opinion in *Cohen*, 326 F.Supp. 1159, (E.D.Va. 1971); see also Judge Winter's dissent in *Cohen*, 474 F.2d 395, 401 (4th Cir. 1973).

since they have neither produced data to support their alleged speculation that pregnant teachers would be pushed with resulting injury to the fetus and disabled from fulfilling responsibilities in fire drills, and have only erroneously speculated that absences would increase during the latter stages of pregnancy. The expert medical testimony in the present case has conclusively contradicted the respondents' speculative arguments on absenteeism. (A 25-29)

Although a school board has some degree of discretion in the termination of a teacher, their ultimate decision must be based on fact rather than fiction. In *Johnson v. Branch*, 364 F.2d 177, 181 (4th Cir., 1966) (en banc) the Fourth Circuit laid down a standard for assessing the discretion of a school board:

Discretion means the exercise of judgment not biases or capriciousness. Thus it must be based on fact and supported by reasoned analysis. In testing the decision of the school board the district court must consider only the facts and logic relied upon by the board itself.

It is clear that the facts and logic relied upon by the school board herein have no basis in fact and are not supported by reasoned analysis.

The Chesterfield County School Board does not have in its rules (A. 20) any policy of mandatory leave without pay for any other condition except pregnancy. Indeed, when it is shown by competent medical evidence that a teacher is incapable of teaching due to a physical disability, her contract may be terminated under Title 22, § 217.5 of the Code of Virginia. With other temporary disabilities such as an illness, or a broken leg, a teacher is permitted to continue teaching as long as he

or she feels able and then is given sick leave with pay to the extent sick leave has been accrued by the teacher. (A. 62-64, 117-118) A pregnant woman is not given this freedom of choice. No matter when she leaves her teaching post to have her child, she cannot return to teaching until September of the following year and then only with a doctor's recommendation of fitness. (A. 119) It should be noted that the same doctor's note of fitness to teach was completely disregarded by school authorities when Mrs. Cohen asked to continue teaching until the end of her eighth month.

The respondent school board can give no reason why the time of five months was chosen instead of some other period (A. 39, 42-43, 57, 59-60). Indeed, similar maternity leave regulations discussed in other cases have exhibited a paucity of such cutoff dates at which point a pregnant teacher is compelled to discontinue her work. See, e.g., *Bravo v. Board of Education of the City of Chicago*, 345 F. Supp. 155 (N.D. Ill. 1972) (after four months); *Pocklington v. Duval County School Board*, 345 F. Supp. 163 (M.D. Fla. 1972) (after four and one-half months); *Heath v. Westerville Board of Education*, 345 F. Supp. 501 (S.D. Ohio) (after five months); *Williams v. San Francisco Unified School District*, 340 F. Supp. 438 (N.D. Cal. 1972) (after seven months).

Clearly, such regulations are arbitrarily drawn and are devoid of an elemental consistency that would infer a fair and substantial relationship between the classifications created and any compelling governmental objectives. That the Chesterfield County School Board would treat all pregnancies alike, while medical evidence and the diverse treatment issued by other school

boards establishes that no two pregnancies are alike speaks to the monumental overbreadth of such regulations. The effect of such mandatory leave dates is transparently arbitrary in its application. Consider the petitioner's request to at least continue teaching until the end of the first semester on January 21, 1971. The basis of denial was that it was impossible to make a policy to suit everyone (A. 23). Thus, the regulation at issue operated to arbitrarily deny the students the advantage of having one teacher throughout the semester, thereby disrupting a continuity of education. There are many pregnant teachers, including the petitioner, who insist as do their physicians, that they may continue teaching in order to maintain some continuity of education for their students beyond an arbitrary "threshold" date.

A teacher who is not afforded an opportunity to establish her medical fitness to continue teaching beyond the designated commencement of her compulsory maternity leave is denied her right to due process of law. *Pocklington v. Duval County School Board*, 345 F. Supp. 163 (1972); *Cf. Stanley v. Illinois*, 405 U.S. 645 (1972).

As the mandatory maternity leave provisions mandate "dissimilar treatment" for reasons akin to those reflected in the statutes before the Court in *Frontiero* and *Reed*, these provisions must be also held to violate the command of equal protection.

IV. THESE MATERNITY LEAVE RULES EVEN LACK ANY RATIONAL BASIS

Even viewed in the light of the lesser test of "rational relationship" the regulation "must be reasonable, not arbitrary, and must rest upon some ground

of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Company v. Virginia*, 253 U.S. 412, 415 (1920). In such cases, the basic question for determination is whether there is some ground of difference that rationally explains the different treatment accorded pregnant women and non-pregnant men under the impact of respondents' leave policies. Petitioner contends that a rule subjecting pregnant women to resignation or forced leave without pay is devoid of a "rational basis" as defined by this Court.

During discovery depositions, the following rationale for the five month maternity leave provision was advanced upon deposition by members of the school board and its superintendent: (1) increased absence from school by teachers who become pregnant (A. 39, 44, 48, 58, 106); (2) threat to the health of the pregnant teacher from pushing in the hallways and climbing stairs (A. 45, 48-49, 56, 60-61); (3) physical appearance of the teacher more than five months pregnant (A. 42, 53-54, 56). The arbitrariness of the policy can best be seen in the statement of School Board member C. C. Wells, who, when asked when a teacher should stop teaching, answered "I would say when they become very conspicuous . . . because some of the kids say my teacher swallowed a watermelon" When Superintendent Kelly was asked to sum up his interpretations of the five-month rule, he replied that his dual concerns were the questions of absenteeism and the safety of the mother (A. 65). No bases other than personal experience and opinion were able to be cited as a foundation for these reasons for the policy.

Neither the Superintendent nor any School Board member offered this "continuity in the educational program" as justification for these policies at their depositions. At trial, Superintendent Kelly altered his position by offering, for the first time, his opinion that the maternity leave provisions were grounded in a "continuity of education" hypothesis. When questioned, Kelly admitted that his "revised" testimony on the five-month rule occurred to him primarily because of the litigation as distinguished from the reason for the policy. (A. 16).

**A. Administrative Convenience Is Insufficient To
Uphold the Rule**

At trial, Kelly maintained that the main thesis for the enactment of the maternity policy was one of administrative convenience, i.e., the need for school authorities to know "that a teacher is going to leave so that we can start looking for a qualified replacement for that teacher." (A. 109)

This right of school authorities to plan for the departure of a pregnant teacher has been raised and dismissed in other district and circuit court cases involving maternity leave.¹² While admitting that a five-month rule might simplify somewhat the determination of a cutoff date and task of locating a replacement teacher to enter the classroom, these same courts, relying on *Stanley v. Illinois*, 405 U.S. 645, 656 (1972), have reasoned that the fact that a rule reduces administrative workload insufficient to sustain discriminatory treatment:

¹² *LaFleur*, *supra*, at p. 1188; *Williams*, *supra*, at p. 445; *Bravo*, *supra*, at 157-158; *Green*, *supra*, at p. 636; *Heath*, *supra*, at p. 506; *Robinson*, *supra*, at p. 37.

Procedure by presumption is always cheaper than individual determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and the child. It therefore cannot stand.

Further support for this view rejecting administrative convenience can be found in *Reed v. Reed*, *supra* and *Frontiero v. Richardson*, *supra*.

In *Reed*, the Court held that even though the State's interest in achieving administrative efficiency "is not without some legitimacy," "[T]o give a mandatory preference to members of either sex over members of the other, merely to accomplish elimination of hearings on the merits, is to make the very kind of arbitrary legislation choice forbidden by the [Constitution]. . . ." *Reed*, *supra*, at 76.

B. A Mandatory Maternity Leave Rule Does Not Promote Continuity of the Educational Process

At trial, Superintendent Kelly expressed the opinion that any absence from the classroom tends to disrupt the teaching process (A. 110) and found that a "study" of elementary teachers requesting maternity leave showed that they had more absences from school during the third, fourth and fifth months compared to similar months during the previous year. (A. 111). Dr. Kelly admitted that he had no way of knowing from School Board records and that he had never inquired from medical authorities what the absentee rate might be for a pregnant teacher beyond the fifth month of pregnancy (A. 117). More importantly, all of the conjectures of the Superintendent and the School Board con-

cerning increased absenteeism, possible dangers to the health and welfare of the pregnant woman and fetus from pushing in the halls and climbing stairs, and physical dependency on her doctor were contradicted by expert medical testimony.

In upholding the maternity leave rule at issue, the Fourth Circuit indulged in the same type of speculation concerning the "uniqueness" of pregnancy versus other physical disabilities or conditions.

The majority fails to note that the element of predictability is also present in the case of a teacher suffering from a known disorder or disability that might necessitate an operation sometime in the future. Judge Winter, in his dissenting opinion, stressed that,

the general sick leave requirements contain no requirement of notice, a mandatory beginning of sick leave or continuation of employment after notice until surgery for *any* elective surgery for *any* teacher male or female. Yet it cannot be said that the disruptive effect on the students or the burden on the school administration is any less in the case of any elective surgery than the disruption and burden occasioned by a pregnant teacher's absenting herself to deliver. Indeed, it would be greater since the pregnant teacher would have been required to give notice of her impending confinement and thus school officials would have ample time in which to find a replacement. To me, the discrimination is obvious. [*Cohen, supra*, at 401-402.]

Indeed, in the instant case, it is quite logical to assume that greater disruption was created by terminating the employment of petitioner on December 18, 1971, only one month from the end of the first semester.

Hence, the history of this litigation establishes that the "continuity of education" argument was advanced more as an afterthought than as a serious explanation for the regulation.

In *Green v. Waterford Board of Education, supra*, the Second Circuit considered this "continuity" rationale and reached the following conclusion:

Continuity of instruction is surely an important value. Where a pregnant teacher provides the Board with a date certain for commencement of leave, however, that value is preserved; an arbitrary leave date set at the end of the fifth month is no more calculated to facilitate a planned and orderly transition between a teacher and a substitute than is a date fixed closer to confinement.

Moreover, this Court has recently shown a disinclination to speculate as to what unexpressed legitimate state purposes may be rationally furthered by a challenged statutory classification. See *Gunther, supra*, note 3, at 33 (discussing *James, Judicial Administrator, et al v. Strange*, 407 U.S. 128 (1972)). Nevertheless, no rationalization, whether offered or omitted by the respondents, can adequately camouflage the essentially unreasonable, arbitrary, and inequitable classification inherent in the regulation at issue.

The mandatory leave policy for pregnant teachers was born out of prejudice and ignorance. In a very few instances, it has been sustained as a matter of convenience. It must be viewed for what it truly is, an anachronism and nothing more.

**OVERWHELMING AUTHORITY SUPPORTS PETITIONER'S
POSITION**

As previously cited in this brief, numerous other federal courts have already decided this question favorably to the position of the petitioner. While this court is the final arbiter of these constitutional questions, the other courts deciding this issue have been so overwhelmingly in favor of petitioner's view that she respectfully requests this court to give great weight to all these other jurists. Thus the Second, Sixth and Tenth Circuits have already decided this issue favorably to petitioner's view respectively in *Green v. Waterford Bd. of Ed.*, *supra*; *LaFleur v. Cleveland Bd. of Ed.*, *supra*; and *Buckley v. Coyle Public School System*, *supra*. Additionally district courts in the Second (New York), Fifth (Florida), Sixth (Ohio and Kentucky), Seventh (Illinois) and Ninth (California) circuits have decided this issue favorably to petitioner's view in *Monell v. Department of Social Services*, 4 E.P.D. 5936 (S.D.N.Y. 1972) *Pocklington*, *supra*, *Heath*, *supra*, *Garner*, *supra*, *Bravo*, *supra*, and *Williams*, *supra*. Accordingly every federal court, aside from the Fourth Circuit, has decided the issue of mandatory maternity leave for teachers favorably to petitioner's view. Indeed the majority of judges in the Fourth Circuit litigation decided the issue favorably to petitioners.¹³

At the time of the institution of this suit, state agencies and educational institutions were specifically exempted from the Act. 42 U.S.C.A. § 2000e (b); 42

¹³ J. Young of the U.S. District Court in Baltimore sat by designation of the original Fourth Circuit panel and voted for petitioner. With J. Merhige and the three dissenting circuit judges that made five federal judges in favor of petitioner against the four in the majority opinion.

U.S.C.A. § 2000e-1.¹⁴ On March 24, 1972, these exemptions were repealed by the Equal Employment Opportunity Act of 1972, P.L. 92-261 and on April 5, 1972, the Equal Employment Opportunity Commission adopted guidelines declaring that exclusion of employees "from employment . . . because of pregnancy is in *prima facie* violation of Title VII" (29 C.F.R. § 1604.10(a), and requiring employers to treat disabilities caused by pregnancy and childbirth like other temporary disabilities (29 C.F.R. § 1604.10 (b)). (See Appendix to Petitioner for Certiorari 28a-29a)

The significance of the Commission's guidelines was pointed out by this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971). "[t]he administrative interpretation of the Act by the enforcing agency is entitled to great deference" Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress. As this Court stated in *Frontiero, supra*, concerning Title VII and § 1 of the Equal Rights Amendment, "Thus Congress has itself concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration."

Indicative of the changes in economic and social life since the enactment of Title VII, women workers—principally blue collar workers—have successfully

¹⁴ While public employees were specifically exempted from Title VII coverage it was assumed by Congress that the Fourteenth Amendment afforded them the same protection as private employees would receive under Title VII (40 Cong. Rec. 13169-72, May 9, 1964).

challenged laws restricting their working conditions. As the work day shortened from twelve hours to eight, and the work week from six days to five, women found that these laws, however "protective" in origin, were "protecting" them from better-paying jobs and opportunities for promotion. See, e.g., *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971); *Ridinger v. General Motors Corp.*, 325 F.Supp. 1089 (S.D.Ohio 1971); *Kober v. Westinghouse Electric Corp.*, 325 F.Supp. 467 (W.D. Pa., 1971). To that effect, it has been held that the scope of the Title VII provision is not confined to explicit discrimination based "solely" on sex; in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. *Sprogis v. United Air Lines*, 444 F.2d 1194 (1971), cert. den. 92 S. Ct. 536. See also *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir., 1969), *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir., 1971).

The wide-reaching outgrowth of the court cases at issue and the promulgation of the EEOC guidelines prohibiting exclusion of employees because of pregnancy can readily be seen in the number of state courts, agencies and labor organizations that have examined the problem of maternity leave and have concluded that these policies constituted sex discrimination under the guise of protective legislation. *State Division of Human Rights v. Board of Education of Union Free School District No. 22*, Case Nos. CS 21025-70 et seq. (June 29, 1971); *Awadallah v. New Milford Board of Education*, N.J. Dept. Law and Public Safety, Sept. 29, (1971); *Blair v. New Milford Board of Education*, No. EO2ES-5337 (Sup. Ct. Hackensack, N.J.,

Jan. 20, 1971); *Truax v. Edmonds School District #15*, Dkt. # 107915, (Superior Ct. Snohomish County, Washington, August 1971); Wisconsin Administrative Code § 88.20; *Southgate Educational Association and Board of Education of Southgate Community School District*, AAA Case No. 5439-0323071 (Aug. 3, 1971); *Middletown Board of Education* (arbitrator's decision) 56 L.A. 830, 832 (1971); *Flo v. General Electric Company*, 195 N.Y.2d 652 (1959); *Tecumseh Products Co. v. Wisconsin Employment Relations Board*, 126 N.W.2d 520 (1959).

The Department of the Army in its interim changes to AR 635-120 has stated that "the officer will continue to work until the doctor or her commanding officer determines that it is in the best interest of the individual or the service that she be relieved from her duty assignment." See also *Robinson v. Rand*, 340 F.Supp. 37 (D. Col. 1972) and *Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971) remanded by the Supreme Court on the issue of mootness. Furthermore, the Civil Service Commission has currently commissioned a panel to bring its regulations concerning maternity leave into compliance with the EEOC guidelines, *supra*.

The policy makers of governmental agencies have taken the same position. The Office of Federal Contract Compliance of the U.S. Department of Labor has issued interpretative guidelines for enforcing Executive Order 11246 which prohibits sex discrimination by employers holding federal contracts. 42 U.S.C.A. § 2000e. The Sex Discrimination Guidelines provide in part, "Women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing." 41

C.F.R. § 60-20.3(g). Further interpretations of the guidelines state that the time when maternity leave shall begin . . .

is primarily a medical decision which is not reasonable for a contractor to make in terms of a blanket policy. The time when a woman leaves before childbearing is normally a matter between the pregnant employee and her doctor. John Wilks, *Memorandum*, Dept. of Labor, Nov. 1970.

The Citizens Advisory Council on the Status of Women of the Dept. of Labor adopted the following *Statement of Principles* on October 29, 1970:

Childbirth and complications of pregnancy are for all job-related purposes, temporary disabilities and should be treated as such under any health insurance, temporary disability insurance, or sick leave plan of an employer, union, or fraternal society. Any policies or practices of an employer or union, written or unwritten, applied to instances of temporary disability other than pregnancy, should be applied to incapacity due to pregnancy or childbirth, including policies or practices relating to leave of absence, restoration or recall to duty, and seniority.

At least 70 countries afford women paid maternity leave or comparable insurance benefits.¹⁵ These policies are being urged throughout the labor force.¹⁶

¹⁵ "The Report of the Committee on Civil and Political Rights" to the President's Commission on the Status of Women, 196.

¹⁶ See "Unemployment Insurance Letter No. 1097", urging states to consider unemployment insurance for maternity leave; AFL-CIO 1969 convention resolutions, UAW 1970 Convention resolutions urging a single system of statutory insurance protection against wage loss due to temporary disability, including illness, pregnancy and maternity; *Report of the Committee on Social Insurance and Taxes*, President's Commission on the Status of Women, Oct. 1963, which also urges cash maternity benefits.

While petitioner recognizes that the court is not bound by the foregoing decisions of agencies, commissions, etc., she urges that this Court find their rationale and pervasiveness throughout the work force and the differing forums as more than persuasive.

VI. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, *EN BANC*, VIOLATED PETITIONER'S CONSTITUTIONALLY GUARANTEED RIGHT TO DUE PROCESS.

Rule 35 of the Federal Rules of Appellate Procedure suggests that an *en banc* rehearing by a Court of Appeals will be ordered where it is (1) "necessary to secure or maintain uniformity in decisions, or (2) when the proceeding involves a question of exceptional importance." Since no contradictory decisions were to be found in the Fourth Circuit or any other circuit of the United States Courts of Appeals, it must be concluded that the Court of Appeals granted rehearing *en banc* in this matter because there were questions of "exceptional importance" involved.

Under Rule 40 of the Federal Rules of Appellate Procedure, petitioner was precluded from filing an answer to the Petition for Rehearing without a specific request to do so by the Court of Appeals. However, Rule 40 further suggests that "a Petition for Rehearing would ordinarily not be granted in the absence of such a request." Rule 40 in authorizing the use of discretion by the Court of Appeals does not sanction an abuse of that discretion.

The original appellant brief was filed more than fourteen months prior to the January 2, 1973 Order granting rehearing *en banc*. Appellate oral argument took place on January 4, 1972, over a year prior to the Court of Appeals Order reversing the lower Court.

Additionally, five of the seven judges sitting on the Fourth Circuit bench never had the benefit of any oral argument in this case. Every major federal decision covering the question of pregnant teachers' rights has been rendered subsequent to the oral argument.¹⁷ Nevertheless, petitioner (appellant below) was not granted leave to file additional briefs or present oral argument on these cases.

In the *en banc* decision of the Fourth Circuit Court of Appeals Judge Winter in his dissent makes frequent reference to the trial record. Contrarily, Chief Judge Haynsworth, speaking for the Court, makes no such reference. Had the petitioner been granted the opportunity to file a brief in her petition for rehearing, she would have demonstrated that the decision of the Court *en banc* was not supported by the evidence at trial.

Furthermore when petitioner (appellant below) was informed of the rehearing *en banc* order she immediately sought oral argument (see p. 1a, *infra*) which was rejected by the Court of Appeals (see p. 3a, *infra*), which had apparently written its opinions prior to ordering the rehearing *en banc*.

Considering the above circumstances, it is difficult, if not impossible to conceive of a series of procedures more devoid of due process. The Court of Appeals acted solely upon respondents' Petition and Suggestion. Counsel for petitioner were not afforded the opportunity to respond. They were not allowed to incor-

¹⁷ See *LaFleur, supra*; *Green, supra*; *Monell, supra*; *Pocklington, supra*; *Williams, supra*; *Bravo, supra*; *Heath, supra*; and *Garner, supra*. See also Public Law 92-261, 92nd Cong., H.R. 1746 (Equal Employment Op. Act of 1972), which amendment extended the coverage of Title VII to employees of state and municipal governments. (See Appendix 28a-29a in the Petition for Certiorari.)

porate recent decisions into the theory of their case or to distinguish contrary decisions. In this system of jurisprudence which extols the principles of advocacy, petitioner was denied the right to advocate. Such a denial in the face of the great significance and far reaching effect of this case, constitutes more than a mere abandonment of the reasonable bounds of judicial discretion. It is an effective denial of petitioner's due process of law.

CONCLUSION

It is respectfully submitted that for the foregoing reasons, the judgment of the United States District Court of Appeals for the Fourth Circuit rendered *en banc* January 15, 1973 should be reversed and the judgment of the United States Court of Appeals for the Fourth Circuit rendered September 20, 1972 should be reinstated.

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APPENDIX

APPENDIX

1a

January 9, 1973

Clerk of Court
United States Court of Appeals
Post Office Building
Richmond, Virginia

RE: Cohen v. Chesterfield County School Board, et al.
No. 71-1707

Dear Sir:

I have received a copy of the Order of this Court in this matter filed on January 2, 1973, granting rehearing *en banc* and submitting the case on the briefs and tape of oral argument. I would like to protest this procedure by the Court and have you transmit my request to the Court that the Order be vacated and the Court follow the procedure outlined by the Federal Rules of Appellate Procedure.

Appellate Rule 35 indicates that rehearing *en banc* will be ordered where 1) it is necessary to secure or maintain uniformity in decisions; or 2) where a question of exceptional importance is involved. Since there are no contradictory decisions in this circuit or other United States Courts of Appeals, I do not see how the Court could grant this to secure uniformity. Accordingly, it must consider this a question of exceptional importance.

Under Appellate Rule 40, appellees were precluded from filing any answer to the petition for rehearing in this matter without a request from the Court. However, Rule 40 suggests that "A petition for rehearing will ordinarily not be granted in the absence of such a request."

I would further bring to your attention that this matter was briefed over fourteen (14) months ago, and that argument of the same was over one (1) year ago. Since the Court has precluded appellee from filing any responsive pleadings to the petition for rehearing, in violation of the

spirit of Rule 40, the Court has effectively denied appellees from arguing to the Court a number of major decisions in this area rendered within the last twelve (12) months.

If the Court truly considered this matter one of "exceptional importance" under Rule 35, then I fail to understand why they did not follow the recommended procedure under Rule 40 of allowing appellees to file a response to the petition for rehearing and, in fact, not follow the procedure of setting this matter back on the docket for rehearing.

I would accordingly request that the Court vacate its Order granting the petition for rehearing and allow the appellees to file a response under Rule 40. Then, should a petition for rehearing be awarded, the matter should thereafter be set down for argument and briefing by the parties in order that the Court may decide it on current authorities. This also would give the appellees the fair procedures to which they are entitled. I would further point out that these proceedings should not only afford appellees due process but it should afford the appearance of due process rather than the appearance of being decided behind closed doors without a chance for litigants before this Court to fairly argue their case.

Very truly yours,

PHILIP J. HIRSCHKOP

PJH:hns

CC: OLIVER W. HIXON, III ESQUIRE
SAMUEL W. HIXON, III, ESQUIRE
FREDERICK T. GRAY, ESQUIRE
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JOHN MANN, ESQUIRE
DAVID RUBIN, ESQUIRE

bcc: The Honorable ROBERT R. MERHIGE, JR.

APPENDIX

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

January 17, 1973

Philip J. Hirschkop, Esquire
110 North Royal Street
Alexandria, Virginia 22313

No. 71-1707—Mrs. Susan Cohen v. Chesterfield County
School Board, et al.

Dear Mr. Hirschkop:

Your letter dated January 9, 1973 regarding the above referenced case was received on January 15, 1973. The Court's opinion in the referenced case was received in the same mail shipment that delivered your letter. However, pursuant to your request your letter was transmitted to the Court.

Since the letter under consideration was addressed to me, I would respond to its two major points of inquiry. Firstly, I have observed that Rules 35 and 40 of the Federal Rules of Appellate Procedure provide for precisely what was done in the instant case, and the procedure followed was not unusual for like cases. Specifically, Rule 40 reads in part, "If a petition for rehearing is granted the Court may make a final disposition of the cause without reargument . . ."

Secondly, I wish to reassure you that your letters of June 21, 1972, July 20, 1972, August 3, 1972 and December 29, 1972, which contained numerous citations of recent decisions (as well as similar letters from all counsel), have all been forwarded to and considered by the Court. Therefore the desire of counsel to update the Court's awareness of current authorities has been substantially achieved.

I thank you for directing your letter to my attention. It is our belief that the clerk's office exists to serve not only the Bench but the Bar as well. To that end we will ever be pleased to be of whatever service we may.

Sincerely,

/s/ WILLIAM K. SLATE, II
William K. Slate, II

WKS/fs

cc: OLIVER RUDY, ESQUIRE
SAMUEL W. HIXON, III, ESQUIRE
FREDERICK T. GRAY, ESQUIRE
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Supreme Court, U. S.
FILED

JUL 6 1973

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1129

SUSAN COHEN, *Petitioner*

v.

CHESTERFIELD COUNTY SCHOOL BOARD ET AL.,
Respondents

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND
AMICUS CURIAE BRIEF IN SUPPORT OF REVERSAL**

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7

IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1129

SUSAN COHEN, *Petitioner*

v.

CHESTERFIELD COUNTY SCHOOL BOARD ET AL.,
Respondents

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The State of Maryland Commission on Human Relations and the Women's Law Center hereby respectfully move for leave to file the attached brief *amicus curiae* in this case pursuant to Supreme Court Rule 42(2). The consent of the petitioner has been obtained. The respondent has denied consent.

The interest of the State of Maryland Commission on Human Relations arises because it administers and enforces its state's fair employment practices law which in its relevant parts is identical to Title VII of the

Civil Rights Act of 1964, as amended. 42 U.S.C. 2000e. The issues raised in these proceedings are similar to issues raised before the State Commission. Affirmation of the decision below could result in practices which perpetuate sex discrimination and affect the enforcement responsibilities of the State Commission.

The Women's Law Center is dedicated to securing equal rights for women through law. The Center is presently litigating issues parallel to and dependent on the issues raised in this case.

Respectfully submitted,

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INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Amicus Curiae Authority	2
Interest of Amicus Curiae	2
Statute Involved	3
Statement	3
Argument	6
I. The classification and special treatment of pregnant teachers by the School Board pursuant to its maternity leave regulations constitute invidious discrimination without a compelling State interest	6
II. The maternity leave policy of the School Board bears no rational relationship to a legitimate State objective	9
III. The equal protection clause is at least as broad as Title VII of the Civil Rights Act of 1964, which would prohibit the maternity leave regulations	13
Conclusion	16

CITATIONS

CASES:

<i>Carrington v. Rash</i> , 380 U.S. 89 (1965)	11
<i>Castro v. Beecher</i> , 459 F.2d 725 (1st Cir. 1972)	15
<i>Chance v. Board of Examiners</i> , 458 F.2d 1167 (2nd Cir. 1972)	14, 15
<i>Frontiero v. Richardson</i> , 93 S. Ct. 1764 (1973)	7, 8, 9
<i>Graham v. Richardson</i> , 403 U.S. 365 (1971)	6
<i>Green v. Waterford Board of Education</i> , 473 F.2d 629 (2nd Cir. 1973)	11

	Page
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971)	13, 15
<i>Griswold v. Connecticut</i> , 381 U.S. 479 (1965)	7
<i>Reed v. Reed</i> , 404 U.S. 71 (1971)	9, 11
<i>Royster Guano Co. v. Virginia</i> , 253 U.S. 412 (1920) ..	9
<i>Shapiro v. Thompson</i> , 394 U.S. 618 (1969)	6, 7, 8
<i>Skinner v. Oklahoma</i> , 316 U.S. 535 (1942)	7
<i>Stanley v. Illinois</i> , 405 U.S. 645 (1972)	8, 11, 12
<i>Thomas v. Collins</i> , 323 U.S. 516 (1945)	8
<i>United States v. Guest</i> , 383 U.S. 745 (1966)	7
<i>Weber v. Aetna Casualty & Surety Co.</i> , 406 U.S. 104 (1972)	8
<i>Wieman v. Updegraff</i> , 344 U.S. 183 (1952)	7

STATUTES:

Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970)	3, 4, 14, 15
Civil Rights Act of 1964, 42 U.S.C. § 2000e (1970) ..	2, 13, 14

MISCELLANEOUS:

Equal Employment Opportunity Commission Guide- lines on Discrimination Because of Sex, 29 CFR § 1604	13, 14
Senate Report No. 872, 88th Congress, 2nd Session (1964)	14

IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1129

SUSAN COHEN, *Petitioner*

v.

CHESTERFIELD COUNTY SCHOOL BOARD ET AL.,
Respondents

AMICUS CURIAE BRIEF IN SUPPORT OF REVERSAL

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Virginia is reported at 326 F. Supp. 1159 (1971).

The opinion of the United States Court of Appeals, Fourth Circuit, is reported at 474 F.2d 395 (1973).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). Certiorari was granted by this Court on April 23, 1973. 93 S. Ct. 1925 (1973).

QUESTION PRESENTED

Is a Chesterfield County School Board regulation which requires that pregnant teachers begin a mandatory leave of absence at least four months prior to the expected birth of the child constitutionally permissible under the equal protection clause of the fourteenth amendment?

AMICUS CURIAE AUTHORITY

The State of Maryland Commission on Human Relations and the Women's Law Center file a brief *amicus curiae* in these proceedings pursuant to Rule 42(2) of the Rules of the Supreme Court of the United States. The written consent of the petitioner has been obtained. The respondent has not consented.

INTEREST OF AMICUS CURIAE

The State of Maryland Commission on Human Relations administers and enforces state fair employment practices law which in its relevant parts is identical to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e. The issues raised in these proceedings are similar to issues raised before the State Commission. Affirmation of the decision below could result in practices which perpetuate sex discrimination and affect the enforcement responsibilities of the State Commission.

The Women's Law Center is dedicated to securing equal rights for women through law. The Center is presently litigating issues parallel to and dependent on the issue raised in this case.

STATUTES INVOLVED

The Civil Rights Act of 1871 provides in relevant part at 42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT

Mrs. Susan Cohen was first employed by Chesterfield County School Board (School Board) for the 1968-69 school year, and again for the 1969-70 and 1970-71 school years under similar employment contracts as required by law.

The maternity leave regulations of the School Board provide that notice must be given in writing six months prior to the expected date of birth. Termination of employment of the expectant mother, under the regulations, must occur at least four months before the expected birth. Extensions are possible only in the discretion of the superintendent upon recommendations of the teacher's physician and principal. A leave of absence may be requested and granted to teachers having a record of satisfactory performance, with re-employment guaranteed no later than the first day of the school year following written notice from the physician that the teacher is physically fit and that the child will cause minimal interference with job

responsibilities. All personnel benefits are retained during the leave unless the teacher accepts other employment during that time.

On or about November 2, 1970, in accordance with the regulations of the School Board, Mrs. Cohen informed the School Board in writing that she was pregnant and that the estimated date of delivery was April 28, 1971. She initially requested that she be permitted to continue working until April 1, 1971 and supplied a certificate from her doctor to the effect that she could continue working as long as she chose. This request was denied and she was granted leave effective December 18, 1970, pursuant to the terms and conditions of the maternity leave regulations.

Mrs. Cohen renewed her request before the School Board itself, amending the request to suggest as an alternative leave date January 21, 1971, the end of the first semester of classes she was teaching. The principal of Mrs. Cohen's school had previously requested that she be permitted to teach until the end of the first semester. The renewed request was also denied.

Suit was subsequently brought in United States District Court for the Eastern District of Virginia, 349 F. Supp. 687 (E.D. Va. 1972). Mrs. Cohen complained that the maternity leave regulation of the School Board violated her constitutional rights in that it discriminated against her solely on the basis of her sex, thereby violating the equal protection clause of the fourteenth amendment of the Constitution of the United States. The defendant School Board's action in terminating her employment therefore violated the Civil Rights Act of 1871, 42 U.S.C. § 1983.

The District Court found, upon unrefuted medical evidence, that there was no medical reason for the School Board's regulation, and that, in fact, women are more likely to be incapacitated in the early stages of pregnancy than the last four months. It was also found that there was no psychological reason for the mandatory leave of absence.

Nor did the District Court find any tenable administrative reason for the regulation. The contentions of the School Board for the regulation, such as fear of injury to the fetus and inability to carry out fire drills, were found to be nugatory and not based on any empirical evidence. Neither was there any empirical data to substantiate the School Board's contention that absences increase in the later months of pregnancy.

The conclusion of the District Court was that the maternity leave policy was arbitrary and discriminatory within the proscription of the equal protection clause of the fourteenth amendment. The District Court held that Mrs. Cohen was entitled to her salary, seniority rights, and all other rights and benefits she would have received had she been permitted to teach until April 1, 1971.

The U. S. Court of Appeals for the Fourth Circuit first affirmed the judgment of the District Court, then, on rehearing *en banc* reversed that judgment. 474 F.2d 395 (4th Cir. 1973). It was there held that since a pregnancy regulation did not apply to women in an area in which they compete with men, there was no invidious discrimination. The Court of Appeals concluded that the School Board was justified in its regulation since the nature of pregnancy permits planning

for a period of confinement and assures the opportunity to secure a more permanent replacement. This appeal followed.

ARGUMENT

I. The Classification and Special Treatment of Pregnant Teachers by the School Board Pursuant To Its Maternity Leave Regulations Constitute Invidious Discrimination Without a Compelling State Interest.

The maternity leave regulations of the School Board discriminate against Mrs. Cohen because of her sex, and interfere with her rights to work and to have children. The United States Constitution, Amendment XIV, § 1, declares that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The traditional test of equal protection is to determine whether the classification at issue is "without any rational basis." *Shapiro v. Thompson*, 394 U.S. 618, 638 n. 20 (1969). However, in two special classes of cases, those involving infringement by the state upon "fundamental rights" safeguarded by the Constitution, and those involving "suspect classifications," this Court has identified infringement as invidious discrimination and has employed a much stricter test, in fact, the "strictest test of judicial scrutiny." *Shapiro v. Thompson*, *supra* (fundamental right); *Graham v. Richardson*, 403 U.S. 365 (1971) (suspect classification). Where invidious discrimination is found, under the applicable test, the classification is unconstitutional "unless [it is] shown to be necessary to promote a *compelling* governmental interest." *Shapiro v. Thompson*, *supra*, 394 U.S. at 634 [emphasis in original].

The right to work and the right to have children are fundamental rights safeguarded by the Constitution.

Rights need not be ascribed to any particular constitutional prohibition. *Shapiro v. Thompson, supra*, 394 U.S. at 630 n. 8. It is sufficient to show that the right in question is so elementary as to have been conceived from the beginning as "a necessary concomitant of a stronger Union" created by the Constitution. *United States v. Guest*, 343 U.S. 745, 757-758 (1966). The right to procreate, free from unjustified interference by the state, is certainly such an elementary right, and is necessary to the very existence of the Union. *Skinner v. Oklahoma*, 316 U.S. 535 (1942). The right to earn a livelihood is likewise an elementary and necessary right. This Court, in *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952), refused to consider whether an abstract right to public employment exists, but found that the Constitution extended its protection to the public servant whose exclusion was patently arbitrary or discriminatory.

The School Board, in its policy regarding maternity leave, in effect forces the female teacher to choose between procreation and employment. Such a choice not only imposes unconstitutional limitations on each of these rights, but also violates the right of privacy in the marriage relationship recognized in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Subsequent to the decision of the Court of Appeals in this case, this Court, in *Frontiero v. Richardson*, 93 S. Ct. 1764 (1973) in the majority opinion of Brennan J., held that sex is a suspect classification, like classifications based upon race, alienage, and national origin. The Court said, at 93 S. Ct. 1764, 1770:

Moreover, since sex, like race and national origin is an immutable characteristic determined solely

by the accident of birth, the imposition of special disabilities upon members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility" *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972).

Since sex is a suspect classification, any classification based on sex is deemed invidious and "must therefore be subjected to strict judicial scrutiny." *Frontiero v. Richardson*, *supra*, 93 S. Ct. at 1768.

Where a classification is invidious and subjected to strict judicial scrutiny, the classification can be justified only by showing a "compelling state interest." *Shapiro v. Thompson*, *supra*, 394 U.S. at 638. Justification can be found only on a showing of a "clear public danger, actual or impending," and only in cases of "the gravest abuses, endangering paramount interests" is there grounds for limitation. *Thomas v. Collins*, 323 U.S. 516, 530 (1945). No such compelling interest could be shown by respondent in this case.¹ Nor can this case be distinguished, as the Court of Appeals argued, because it is not an area in which the sexes are in competition. The essence of an equal protection violation is the unjustified or unreasonable adverse treatment of an identifiable class of people. A distinction based on competition misses the mark and is meaningless.²

¹ See Part II. Not even a rational basis exists for the School Board's regulation regarding maternity leave.

² cf. *Stanley v. Illinois*, *supra*. It was there found to be a violation of equal protection to presume that unwed fathers are unfit to raise their children, though clearly there was no competition between wed and unwed fathers.

II. The Maternity Leave Policy of the School Board Bears No Rational Relationship to a Legitimate State Objective.

The School Boards maternity leave policy constitutes invidious discrimination based on sex and is therefore subject to the "compelling interest" test as set out in *Frontiero v. Richardson*, *supra*. Even under the traditional, less strict standard of judicial scrutiny, the maternity leave policy of the School Board must be found violative of the Equal Protection Clause. To be valid under the more lenient test:

[a] classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).³

The crux of Mrs. Cohen's argument is that to disqualify a physical capable woman from working solely because of a condition related to her sex is unconstitutionally arbitrary.

It cannot be said that the regulation is reasonably based upon a fear for the health and safety of the mother or the child. Under the regulation a pregnant teacher is not permitted to work even with the consent of her physician, consent such as that obtained by Mrs. Cohen.

The argument of the School Board relied on most heavily by the Court of Appeals was the legitimacy of the School Board's concern for preserving continuity of instruction for the children. However, while it is conceded that continuity of instruction is a legitimate concern of the State, the Court of Appeals failed to

³ See also *Reed v. Reed*, 404 U.S. 71 (1971) quoting with approval the passage from *Royster Guano Co. v. Virginia*, *supra*.

carry the analysis far enough. It is not enough merely to show a legitimate state objective; it must further be shown, where there is an infringement on individual rights, that the means chosen by the state is reasonably related and bears "a fair and substantial relation to" that objective.

The means chosen by the School Board to achieve its announced objective of continuity of instruction is the inflexible and arbitrary regulation requiring termination of employment at least four months prior to the expected date of birth. The operation of the rule in the case at bar resulted in Mrs. Cohen's termination during the semester rather than at the end of the semester, the more logical time suggested by Mrs. Cohen in her renewed request for an extension. Thus, in this case the state's objective was actually defeated by the regulation. Nor is there any reason to believe the regulation will operate less arbitrarily in other cases.

The medical evidence presented to the District Court fails to support the regulation, and in fact supports the contrary conclusion that pregnant women are more likely to be incapacitated during the early stages of pregnancy than during the last four months.⁴ Further, while other illnesses leave no possibility for advance preparation for the teacher's absence, pregnancy generally follows a predictable course, and notice of impending absence based on individual medical considerations is possible far enough in advance to allow school officials more than adequate time to secure a substitute and thereby maintain the desired continuity in instruction.

⁴326 F. Supp. at 1160.

As was pointed out by the Second Circuit Court of Appeals in *Green v. Waterford Board of Education*, 473 F.2d 629 (2d Cir. 1973),⁵ there are other illnesses with accompanying absence that may be planned for in advance, but which are not subjected to a special regulation as is pregnancy. Examples are cases involving voluntary surgery, such as cataract operations. Only males can be subject to the need for prostatectomy, and although notice of the impending absence is possible well in advance, in such a case no medically unnecessary leave of absence is required by the School Board. Female teachers should not be treated differently.

Mere administrative convenience should not be allowed to override the determinative issue, the competence of the individual teacher. To permit the School Board to maintain a maternity leave policy which avoids individual treatment of female teachers and depends on stereotypes to avoid the "inconvenience" of deciding specific cases on their merits is to allow the kind of "procedure by presumption" found constitutionally impermissible in *Stanley v. Illinois*, 405 U.S. 645 (1972). This Court has in the past looked with disfavor on blanket restrictions and insurmountable presumptions by which otherwise qualified individuals may be excluded; this is true particularly where more precise methods of evaluation are available, as they clearly are in this case. *Reed v. Reed*, *supra*; *Stanley v. Illinois*, *supra*; *Carrington v. Rash*, 380 U.S. 89 (1965).

⁵ The facts of *Green* are similar to those in the instant case. The Court of Appeals there found a rule requiring a pregnant teacher to take a leave of absence before she reached the sixth month of her pregnancy unconstitutionally discriminatory.

It is always easier to treat people by presumption than by individualized determination. Administrative speed and efficiency are legitimate governmental objectives, but when speed and efficiency conflict in more than an insignificant way with higher values protected by the Constitution with the rights of the individual protected by the Bill of Rights, they must yield to these higher values. In *Stanley v. Illinois, supra*, this Court said that the Bill of Rights was

designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones. 405 U.S. at 656.

In conclusion, there is no justification for treating pregnancy differently from any other medical disability. To single out for unusual treatment pregnant teachers is clearly to violate the prohibitions of the Equal Protection Clause and the Civil Rights Act of 1871, which gives a cause of action to persons who have been deprived of rights granted by the Constitution under color of law. The best medical evidence contradicts the prescription upon which the School Board's policy is based. The regulation fails to bear "a fair and substantial relation" to the objective of maintaining continuity in instruction, and in fact, operates quite arbitrarily in this regard and even contrary to this interest. And finally the rule is unjustifiable on grounds of administrative convenience as that value conflicts with higher values protected by the Constitution and the Bill of Rights and completely fails to consider individuals and individual competency.

III. The Equal Protection Clause Is at Least as Broad as Title VII of the Civil Rights Act of 1964⁶ Which Would Prohibit the Maternity Leave Regulations.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1964) prohibits discrimination in employment practices on the basis of race, color, religion, national origin, and sex. Pursuant to Title VII the Equal Employment Opportunity Commission, the administrative body charged with enforcement of that Act,⁷ has promulgated certain guidelines. As these guidelines are interpretations of a statute by the administrative body charged with enforcement of the statute, they are accorded great weight by the courts. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

In its *Guidelines on Discrimination Because of Sex*, 29 C.F.R. § 1604 as amended (March 31, 1972), the Equal Employment Opportunity Commission treats specifically the problem of maternity leave. Section 1604.10, "Employment Policies Relating to Pregnancy and Childbirth," reads in relevant part:

(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privi-

⁶ As amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103 (1972).

⁷ 42 U.S.C. § 2000e-4 (1970).

leges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

Section 1604.10 of the *Guidelines* would clearly prohibit a policy, such as that of the School Board, which singled out pregnancy and required an extended leave of absence well in advance of that necessary to the particular case. However, the original statute exempted state agencies and educational institutions from the terms of the Act. 42 U.S.C. § 2000e(b), 42 U.S.C. § 2000e-1. At the time the School Board acted with respect to Mrs. Cohen, the exemption was still in force and she was, therefore, outside the protection of Title VII. This exemption was abolished by amendment on March 24, 1972. 86 Stat. 103 (1972).

Although Congress found the source of power for the enactment of Title VII elsewhere in the Constitution,⁸ the theory and policy underlying the Act are the same as those on which the equal protection clause of the fourteenth amendment is based. The 1871 Civil Rights Act, 42 U.S.C. § 1983, gives a cause of action for violations of the equal protection clause. Recent decisions in cases brought pursuant to 42 U.S.C. § 1983 have been based on the reasoning of the case law developed under Title VII of the 1964 Civil Rights Act; i.e., in *Chance v. Board of Examiners*, 458 F.2d 1167 (2d Cir. 1972), in an action brought under 42 U.S.C.

⁸ i.e., in the Commerce Clause. Senate Report No. 872, 88th Congress, 2nd Session (1964).

§ 1983, the court relied on *Griggs v. Duke Power Co.*, *supra*, in defining the permissible limits of testing and selection standards which have a discriminatory impact. In view of the fact that national policy based on the principles underlying the equal protection clause has found expression in the Civil Rights Act of 1964, and further in view of the fact that the area of employment discrimination is governed concurrently by the fourteenth amendment together with 42 U.S.C. § 1983, and Title VII of the Civil Rights Act, the intent and purpose of Congress as expressed in Title VII and the rulings of the enforcing administrative agency are accorded great weight in determining the limits of the equal protection clause. *Chance v. Board of Examiners*, *supra*; *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972). The limits of protection should be at least as broad as the statutes enacted by Congress.

CONCLUSION

For the reasons stated above, this Court should reverse the decision of the Court of Appeals and reinstate the order of the District Court.

Respectfully submitted,

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AUG 6 1973 SUPREME COURT, U. S.

Nos. 72-777 and 72-1129

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**MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS
CURIAE FOR THE NATIONAL EDUCATION ASSOCIA-
TION AND THE WOMEN'S EQUITY ACTION LEAGUE
EDUCATIONAL AND LEGAL DEFENSE FUND**

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INDEX

	Page
MOTION OF THE NATIONAL EDUCATION ASSOCIATION AND THE WOMEN'S EQUITY ACTION LEAGUE EDUCATIONAL AND LEGAL DEFENSE FUND, INC. TO FILE BRIEF AS <u>AMICI CURIAE</u>	1
BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AND THE WOMEN'S EQUITY ACTION LEAGUE EDUCATIONAL AND LEGAL DEFENSE FUND, <u>AMICI CURIAE</u>	1
INTRODUCTION	1
 ARGUMENT:	
I. The Maternity Leave Policies at Issue Here, Like Similar Policies Which Exist in Most School Systems, Are Derived From Victorian Attitudes Toward Pregnancy and Women and Are Part of a Historical Pattern of Discrimina- tion Against Female Teachers	3
A. Mandatory Maternity-Leave Policies Are Based on a Victorian Attitude Toward Preg- nancy and a Paternalistic Attitude Toward Women	3
B. The Relationship of Mandatory Maternity- Leave Policies to Historic Patterns of Dis- crimination Against Female Teachers	9
II. Mandatory Maternity-Leave Policies Contribute To and Reinforce a General Pattern of Discrimi- nation Against Women in the Teaching Profes- sion	14
A. Current Patterns of Discrimination Against Female Teachers	14
B. The Practical Effects of Mandatory Mater- nity-Leave Policies	16
CONCLUSION	23

TABLE OF CITATIONS

Cases:	Page
Baker v. School District, 120 Neb. 513, 233 N.W. 897 (1931)	11
Board of Regents v. Roth, 408 U.S. 564 (1972)	22
Cerra v. School District, 450 Pa. 207, 299 A.2d 277, 5 FEP 480 (1973)	22
Frontiero v. Richardson, — U.S. —, 93 S.Ct. 1764 (1973)	8
Green v. Waterford Board of Education, 473 F.2d 629 (2d Cir. 1973)	8
Heath v. Westerville Board of Education, 345 F.Supp. 501 (S.D. Ohio 1972)	17, 18
Jameson v. Board of Education of Union School District, 74 W.Va. 389, 81 N.E. 1126 (1914)	11
People <i>ex rel.</i> Peixotto v. Board of Education of the City of New York, 82 Misc. 684, 144 N.Y.S. 87 (Sup. Ct. 1913)	12
Richards v. District School Board, 78 Ore. 621, 153 P. 482 (1915)	11
School City of Elwood v. State, 203 Ind. 626, 180 N.E. 471 (1932)	11
State v. Board of School Directors of City of Milwaukee, 179 Wis. 284, 191 N.W. 746 (1923)	11
 Regulations and Orders:	
Agreement between Board of Education of Cleveland City School District and Cleveland Teachers Union, Local 279 (1971)	18
Board of Education, Danville Independent School District, Policies, Rules and Regulations ch. 3, § 3(f)	5
Board of Education, Tipp City Exempted Village Schools, Rules and Regulations	4
Board of School Trustees, Kokomo-Center Twp. Consolidated School Corp. (Kokomo, Ind.), Administrative Handbook § (5), at 30	5
Central Dauphin School District (Harrisburg, Pa.), Policy Manual ch. 5, Art. 7	6
Clairton School District Board (Clairton, Pa.), Policy Manual § 4511	5
Contract between Monticello (N.Y.) School District and Monticello Teachers' Association, Art. 28(c)	5

Index Continued

iii

	Page
Contract between South Butler County School District and South Butler County Education Association, App. C (1973-76)	18
Franklin County Schools, Handbook	5
Howard-Suamico School System (Green Bay, Wisc.) Teacher's Handbook	6
Milford Public Schools (Milford, Neb.), Teaching Contract	5
Mt. Diablo Unified School District (Concord, Calif.), Faculty Handbook (1972-73)	19
Osseo-Fairchild Schools (Osseo, Wisc.), Teacher's Handbook § 12	5
Pendleton School District No. 16-R (Pendleton, Ore.), Handbook of Policies and Procedures Art. VI, § A	5
Unified School District No. 344 (Pleasanton, Kan.), School Board Policies Art. VIII, § 36	5

Other Sources:

<i>Administrative Practices Affecting Classroom Teachers, Part I: The Selection and Appointment of Teachers</i> , 10 NEA Research Bull. 1 (1932) ..	10, 11, 13
<i>Administrative Practices Affecting Classroom Teachers, Part II: The Retention, Promotion, and Improvement of Teachers</i> , 10 NEA Research Bull. 33 (1932)	15, 16
Beale, Are American Teachers Free? (1936)	10, 11
Brubacher, <i>The Judicial Status of Marriage and Maternity as an Obstacle to the Education of Women for Professional Careers in Public School Teaching</i> , XXVI School and Society 428 (1927)	12
Elsbree, Teachers' Salaries (1931)	11
Morris, <i>The Single Salary Schedule</i> (Teachers College Contributions to Education, No. 413, 1930)	16
NEA, Handbook (1973)	2
NEA, Status of the Married Woman Teacher (1938) .	10
NEA Research Div., Leaves of Absence for Classroom Teachers, 1965-66 (Research Rep. 1967-R5, 1967)	4, 16, 17, 18, 19-20, 22
NEA Research Div., Maternity-Leave Provisions for Classroom Teachers in Larger School Systems (Educational Research Service Circular No. 3, 1966)	4, 6, 8, 13, 17, 19, 20, 21, 22

NEA Research Div., Maternity-Leave Provisions in 157 School Systems in Cities Over 30,000 in Population (Educational Research Service Circular No. 6, 1948)	13
NEA Research Div., Paid Leave Provisions for Teachers in Negotiation Agreements (Research Rep. 1969-R6, 1969)	19
NEA Research Div., Status and Trends: Vital Statistics, Education and Public Finance (Research Rep. 1959-R13, 1959)	9
NEA Research Div., Teacher Opinion Poll XV (1973) (unpublished data, submitted to U.S. Bureau of the Census)	14
NEA Research Div., 26th Biennial Salary and Staff Survey of Public School Professional Personnel, 1972-73 (Research Rep. 1973-R5, 1973)	14, 15
Office of Education, U.S. Dept. of the Interior, The Legal Status of Married Women Teachers (1934)	11
Peters, The Status of the Married Woman Teacher (Teachers College Contributions to Education, No. 603, 1934)	11
Snedden, <i>Personnel Problems in Educational Administration: Married Women as Public School Teachers</i> , 36 Teachers College Record 613 (1935)	10
I Woody, A History of Women's Education in the United States (1966)	9

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**MOTION OF THE NATIONAL EDUCATION ASSOCIATION
AND THE WOMEN'S EQUITY ACTION LEAGUE EDU-
CATIONAL AND LEGAL DEFENSE FUND, INC. TO
FILE BRIEF AS AMICI CURIAE**

The National Education Association (NEA) and the Women's Equity Action League Educational and Legal Defense Fund, Inc. (WEAL Fund) hereby move, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief as *amici curiae*, in

support of respondents in No. 72-777 and petitioner in No. 72-1129. Consent to file this brief was requested of the parties, but petitioners in No. 72-777 and respondents in No. 72-1129 refused to grant such consent.

NEA, organized in 1857 and chartered by special act of Congress in 1906, is the Nation's oldest and largest organization of professional educators. It is also the largest organization of public employees in the nation, with almost 1.4 million members. NEA's purposes, as set forth in its Charter, are "to elevate the character and advance the interests of the profession of teaching and to promote the cause of education in the United States."

NEA is strongly opposed to all forms of discrimination on the basis of race, sex, or other arbitrary classification, in the field of education and elsewhere. Its 1972 Convention adopted a specific resolution on equal opportunity for women, which provides in part (NEA, *Handbook* 1973 62):

The Association . . . urges governing boards, and education associations to eliminate discriminatory practices against women in employment, promotion, compensation, and the appointment or election to leadership positions.

WEAL Fund is a non-profit tax exempt corporation among whose purposes, as stated in its bylaws, are:

To render legal assistance and services to bring women within the full ambit and application of the United States Constitution . . . to insure their full recognition and participation in the educational and economic activities and other facets of American life without discrimination on account of sex . . . to provide legal support and

advice to those seeking employment, promotion or employment benefits without discrimination because of sex . . .

NEA and WEAL Fund believe that the mandatory maternity-leave rules at issue here discriminate against female teachers and are detrimental to the educational process. The rules are an anachronism, held over from an era when matters relating to sex and childbirth were deliberately hidden from children, and when the condition of pregnancy—even in married women—was considered slightly indelicate or even impure. Whatever the sensitivities of an earlier age, a rule which today forces a teacher to forfeit her job merely because she is pregnant, without regard to her personal condition and ability to continue working, is educationally unsound and legally unjustifiable. In the context of a state-run public school system, such a rule constitutes a denial of equal protection of the laws.

The brief and arguments of the parties will necessarily concentrate on the specific facts and issues in these particular cases. The maternity leave rules involved in these two cases, however, are not unusual or unique. As the attached brief demonstrates, most school systems in the United States have similar rules. NEA and WEAL Fund believe, therefore, that the Court's consideration of the issues presented by the parties will be aided by an understanding of the original purposes and historical antecedents of these policies, and the effects which they have on the careers of female teachers of child-bearing age. It is these matters, which will not be covered in detail by the parties, to which the attached brief is addressed.

Wherefore, NEA and WEAL Fund request that this Court grant leave to file the accompanying brief as *amici curiae*.

Respectfully submitted,

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CATIONAL AND LEGAL DEFENSE FUND, AMICI
CURIAE

INTRODUCTION

This brief does not repeat the legal arguments made by the parties. Suffice it to say these *amici* support the contention of the respondents in No. 72-777 and the petitioner in No. 72-1129 that maternity-leave policies which treat pregnancy differently from other forms of tem-

porary disability, and which require pregnant teachers to leave their jobs at a specified stage of pregnancy without regard to their individual ability to continue working, constitute a form of discrimination based on sex and deny pregnant teachers the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution. In our view, these regulations meet neither the "compelling state interest" test which this Court applies to "suspect classifications" nor the more permissive "reasonable classification" test which is generally applicable in equal protection cases.

While we will leave the discussion of these matters to the parties, we believe that a fully-informed consideration of the issues depends upon an understanding of the origins of maternity-leave policies of the kind involved here and their practical effect on female teachers of child-bearing age. The school systems involved in these and other cases have attempted to justify their policies in a variety of ways, but the available historical and empirical evidence supports a conclusion that current maternity-leave policies are rooted in archaic and Victorian attitudes toward pregnancy and paternalistic attitudes toward women. They are part of a pattern of discrimination against women which has long existed, and which still exists, in the Nation's public school systems.

In the first section of this brief, we document these contentions by tracing the original purposes and historical antecedents of mandatory maternity-leave policies. In part II, we analyze the practical impact of mandatory maternity-leave policies on female teachers. As we show, while women constitute the vast majority of all teachers in the public schools, they are

still far from reaching a status of equality with their male counterparts. We believe, and will demonstrate, that mandatory maternity-leave policies contribute significantly to the perpetuation of this unjustified discrimination.

We do not claim that either the historical origins or the practical effects of the various maternity-leave policies are in themselves determinative of the constitutional issues involved here. We do believe, however, that an understanding of the origins and effects of the policies is necessary to place the constitutional issues in proper perspective. We hope in this way to assist the Court in deciding the ultimate question of whether the perpetuation of such policies does in fact deny pregnant teachers the equal protection of the laws.

ARGUMENT

I

THE MATERNITY-LEAVE POLICIES AT ISSUE HERE, LIKE SIMILAR POLICIES WHICH EXIST IN MOST SCHOOL SYSTEMS, ARE DERIVED FROM VICTORIAN ATTITUDES TOWARD PREGNANCY AND WOMEN AND ARE PART OF A HISTORICAL PATTERN OF DISCRIMINATION AGAINST FEMALE TEACHERS

A. Mandatory Maternity-Leave Policies Are Based on a Victorian Attitude Toward Pregnancy and a Paternalistic Attitude Toward Women

At the outset, it should be recognized that the maternity-leave policies involved in these cases are by no means unique. Similar policies exist in the vast majority of public school systems in the United States.¹ A 1966 survey conducted by NEA of school

¹ Of course, maternity leave regulations of a number of school systems are currently in a state of flux, as a result of the fact that federal courts in every Circuit except the Fourth have decided the issue of mandatory maternity leave favorably to the teachers mounting such challenges. See Brief for Petitioner 30, No.72-1129.

systems with enrollments of 25,000 or more students indicated that 49 per cent of schools granting maternity leave required pregnant teachers to take leave at the end of either the fourth or fifth month of pregnancy. An additional 8.7 per cent specified an earlier date, and 29.8 per cent specified a later date—the latest being at the end of the seventh month of pregnancy.²

Several of these policies, by their express terms,³ show that they are based on a prudish aversion to the appearance of pregnancy and a belief that pregnancy is somehow an unwholesome or embarrassing condition to which young children should not be exposed. Under these policies, the mandatory time of termination is often determined not by the length of pregnancy but rather by the teacher's appearance. For example, in Tipp City, Ohio, a teacher must terminate her services five months prior to the expected date of birth or "earlier if the evidence of pregnancy is too pronounced";⁴ in Danville, Kentucky, a teacher must request leave at the beginning of the fifth month of pregnancy unless "the pregnancy

² NEA Research Div., Maternity Leave Provisions for Classroom Teachers in Larger School Systems 2 (Educational Research Service Circular No. 3, 1966) [hereinafter cited as ERS 1966 Circular]. The results of this survey indicate a more permissive policy than would be reflected in a survey which included school systems with enrollments of less than 25,000. Compare, e.g., NEA Research Div., Leaves of Absence for Classroom Teachers (Research Rep. 1967-R5, 1967) encompassing school systems with enrollments of 300 or more students.

³ Unless otherwise noted, the policies quoted below were in effect as of the 1971-72 school year.

⁴ Board of Education, Tipp City Exempted Village Schools, Rules and Regulations.72.

becomes noticeable" before then.⁵ Other school systems require the taking of leave "... when physical fitness and appearance become apparent [sic]";⁶ "when visible signs are apparent";⁷ depending on the "attitude of the children and parents toward the situation"⁸ or the "physical appearance of the teacher";⁹ or at "such time as maternity clothes are necessary."¹⁰ The Franklin County, North Carolina school system requires teachers to resign within the third month of pregnancy under a rule which states: "This applies to personnel working directly with students."¹¹ A "preamble" to the maternity-leave provision in a Nebraska school system states that "teaching while in *obvious* states of pregnancy is not for the best interests of the school's educational program." (Emphasis added.)¹² In Kokomo, Indiana, teachers are exhorted to "exercise good judgment in requesting a leave for pregnancy so that criticism and possible embarrassment may be avoided."¹³

⁵ Board of Education, Danville Independent School District, Policies, Rules and Regulations ch. 3, § 3(f).

⁶ Osseo-Fairchild Schools (Osseo, Wisc.), Teachers Handbook § 12.

⁷ Clairton School District Board (Clairton, Pa.), Policy Manual § 4511.

⁸ Pendleton School District No. 16-R (Pendleton, Ore.), Handbook of Policies and Procedures art. VI, § A.

⁹ Contract between Monticello (N.Y.) Central School District and Monticello Teachers Association art. 28(C).

¹⁰ Unified School District No. 344 (Pleasanton, Kan.), School Board Policies art. VII, § 36.

¹¹ Franklin County Schools, Handbook.

¹² Milford Public Schools (Milford, Neb.), Teaching Contract.

¹³ Board of School Trustees, Kokomo-Center Twp. Consolidated School Corp. (Kokomo, Ind.), Administrative Handbook § k(5), at 30.

A related attitude, reflected in both the mandatory leave dates and the minimum return dates of most maternity-leave policies,¹⁴ is a paternalistic concern for the health and safety of female teachers or the welfare of their families. For example, a Pennsylvania school system provides leave for maternity only reluctantly, stating that:

A married woman's first responsibility will naturally and rightfully be to her husband, household, and children. Should a married female employee become pregnant, her resignation would be best for her, her family and the school.¹⁵

Similarly, a Wisconsin school system addresses itself not to the maternity of "teachers" or "employees" but "of wives working in the . . . system."¹⁶

The same Victorian aversion to pregnancy and paternalistic concern for the "protection" of female teachers and their families were echoed in the testimony of school officials in the present cases. For example, in No. 72-1129, one school board member referred in deposition to the pregnant teacher's "ap-

¹⁴ The 1966 survey indicated that most policies specified as a return date the beginning of the new school term following anywhere from three months to two years after the birth of the child. ERS 1966 Circular, *supra* note 2, at 4, 6-16.

¹⁵ Central Dauphin School District (Harrisburg, Pa.), Policy Manual ch. 5, art. 7. A protective concern would also seem to account for the rule of an Indiana school system which permits a teacher to do substitute teaching during her required two-year absence following the birth of her child, but "in no case may such a teacher do more than a total of 30 days of substitute teaching in any one school year." ERS 1966 Circular, *supra* note 2, at 19.

¹⁶ Howard-Suamico School System (Green Bay, Wisc.), Teachers Handbook.

pearance" (A. 43); another expressed concern over the teacher's becoming "very conspicuous" (A. 53) and the possibility of children saying, "my teacher swallowed a watermelon, things like that." (A. 54.) The former school superintendent who originated the maternity leave policy for the Cleveland Board of Education provided the following explanation for the mandatory leave date:

Well, we had some very embarrassing situations develop where women, who were pregnant, would stay too long in the classroom, and the result was that those teachers were subjected to humiliations, indignities on the part of pupils, generally, who giggled about it, and it was embarrassing to the teacher and it was also disruptive of the classroom. (A. 173a, No. 72-777.)

In justification of the specific cutoff date, he explained "it was at that point when the physical appearance begins to change." (A. 176a, No. 72-777.)

Similarly, a "protective" motive for the mandatory leave date was expressed by Chesterfield County school board members in their concern over the "welfare and the safety of the teacher" (A. 45, No. 72-1129) and "the possibility of an accident" due to "pushing" by students (A. 48, No. 72-1129). A related attitude was expressed by the author of the present Cleveland school board rule in defense of the minimum return date: "I am a strong believer that young children ought to have the mother there . . . it is very important that they be there for the love and tender care of the babies." (A. 184a, No. 72-777.) Indeed, the NEA survey reveals that as recently as 1966 the Cleveland policy gave the teacher's husband a voice in

deciding whether or not the time had come for her to return to her teaching duties.¹⁷

It is ironic that this kind of "protective" concern for the health of the teacher is expressed by the same school systems which refuse to permit a physician to determine how long the teacher can continue working prior to delivery, or how soon she may return thereafter. In any event, this type of rationale has been characterized by this Court as "an attitude of 'romantic paternalism' which, in practical effect, put women not on a pedestal, but in a cage." *Frontiero v. Richardson*, — U.S. —, 93 S.Ct. 1764, 1769 (1973). The regulations in issue here cannot be justified by that rationale any more than by the outmoded and irrational attitudes toward sex and childbirth which underlie them. "Whatever may have been the reaction in Queen Victoria's time, pregnancy is no longer a dirty word." *Green v. Waterford Board of Education*, 473 F.2d 629, 635 (2d Cir. 1973).

In short, whatever new justifications may now be offered in support of the maternity-leave policies at issue, it is clear that their origins are rooted in outmoded attitudes toward pregnancy and women. Moreover, as we shall now show, these policies are also the direct outgrowth of a history of discrimination against women teachers in the public schools.

¹⁷ The husband's agreement was required along with the recommendations of the physician and the Bureau of Personnel. ERS 1966 Circular, *supra* note 2, at 24.

B. The Relationship of Mandatory Maternity-Leave Policies to Historic Patterns of Discrimination Against Female Teachers

Although women have long played a major role in the education profession, they have long suffered from a variety of forms of discrimination. This discrimination was often premised on the view that a woman should not pursue a professional career because her proper place is in the home. Current mandatory maternity-leave rules, we believe, are direct descendants of these earlier discriminatory attitudes and policies.

Women began to enter the teaching profession in increasing numbers after the Civil War. By 1899, 70 per cent of public school teachers were women, and by 1919 the proportion had increased to 86 per cent.¹⁸ Around the turn of the century, there began to develop a tide of opposition to this trend. It was claimed that, by allowing so many women in the schools, "we shall . . . warp the psychics [sic] of our boys and young men into femininity."¹⁹ One result of this concern over the "feminization" of American education was the practice of offering men higher salaries than women to induce them to enter the profession.²⁰ Another result was the development of rules prohibiting the employment of married women or the retention of female teachers after their marriage.²¹ This ban was widespread by the second

¹⁸ NEA Research Div., Status and Trends: Vital Statistics, Education and Public Finance 15 (Research Rep. 1959-R13, 1959).

¹⁹ Quoted in I Woody, A History of Women's Education in the United States 513 (1966) [hereinafter cited as I Woody]. See generally *id.* at 505-14.

²⁰ See p. 19, *infra*.

²¹ I Woody, *supra* note 19, at 509.

decade of this century and became even more prevalent in the 1930's as increasing numbers of unemployed men became available to replace women teachers.²²

Many of the attitudes which underlay the prohibition against married teachers are identical to those which later led to development of mandatory leave for pregnant teachers. As one critic pointed out, the prohibition suggested "that the married state is undignified or unclean or otherwise undesirable for those women who engage in such noble forms of service as school teaching."²³ Another explanation—echoed in testimony below relating to the proper role of the female²⁴—involved fears that employment of married women would discourage the rearing of families²⁵ or, at the very least, would prevent women from devoting sufficient attention and care to their homes.²⁶ "Impaired efficiency" was another argument voiced in defense of this policy, the claim being that "married women teachers are usually too preoc-

²² See Beale, *Are American Teachers Free?* 384 ff, 496 (1936). An NEA survey indicated that in 1928 61 per cent of the school systems in cities of 2,500 or more refused to employ married women, and 50.8 per cent terminated women teachers who married while under contract; by 1931, the percentages had risen to 76.6 and 62.9 per cent, respectively. *Administrative Practices Affecting Classroom Teachers, Part I: The Selection and Appointment of Teachers*, 10 NEA Research Bull. 1, 20 (1932) [hereinafter cited as *Administrative Practices I*].

²³ NEA, *Status of the Married Woman Teacher* 18 (1938).

²⁴ See p. 11, *supra*.

²⁵ Snedden, *Personnel Problems in Educational Administration: Married Women as Public School Teachers*, 36 Teachers College Record 613, 621 (1935).

²⁶ *Administrative Practices I*, *supra* note 22, at 14.

cupied with home interests to give their best efforts to that school.”²⁷

A unique variation on this prohibition appeared in a 1915 rule in Cleveland, which forced teachers to resign when they married, but permitted them to be rehired on a substitute basis at a lower salary at the discretion of the authorities. Within a year, there were 250 married substitutes in Cleveland.²⁸ A preference for male teachers was, thereby, neatly combined with thrift.

Enlightened opinion, state court decisions,²⁹ and the reluctance of male teachers to enter a low-paying profession³⁰ gradually eroded restrictions on employ-

²⁷ *Ibid.* See Peters, *The Status of the Married Woman Teacher* 52 (Teachers College Contributions to Education, No. 603, 1934). This argument bears a striking resemblance to some of the testimony in the present cases. Thus, a school board member in No. 72-1129 stated, “we think the teacher cannot give full time to her classroom work because . . . she has to give more time to her health and her environment.” (A. 54.) And in No. 72-777, a former school superintendent referred to one teacher as “really a good teacher, able, attractive, but her interest was in rearing a family instead of teaching school.” (A. 182a.)

²⁸ Beale, *Are American Teachers Free?* 384 (1936). Some years later, Cleveland modified the rule somewhat to allow the rehiring of a teacher as a substitute after a semester following her termination for marriage; then, upon recommendation of her superior and if she ranked in the upper quarter of her group, she might be permanently reinstated. *Ibid.*

²⁹ See, e.g., *School City of Elwood v. State*, 203 Ind. 626, 180 N.E. 471 (1932); *Baker v. School District*, 120 Neb. 513, 233 N.W. 897 (1931); *State v. Board of School Directors of City of Milwaukee*, 179 Wis. 284; 191 N.W. 746 (1923); *Richards v. District School Board*, 78 Ore. 621, 153 P. 482 (1915); *Jameson v. Board of Education of Union School District*, 74 W.Va. 389, 81 N.E. 1126 (1914). See generally Office of Education, U.S. Dep’t of the Interior, *The Legal Status of Married Women Teachers* (1934).

³⁰ See Elsbree, *Teachers’ Salaries* 43 (1931).

ment of married women in most school systems. In their place, however, were erected barriers against the employment of women with children and the retention of pregnant teachers. The new policies were defended on grounds similar to those used to defend the restrictions on the employment of married women, including "the unfavorable impression which appearances of impending maternity would make on adolescents"³¹ and the notion that "there is no home without a mother, and . . . the old-fashioned mother who considers it her primary function to rear and maintain a pure and proper home is doing yeoman service to the state. The home can never fulfill its true function when its head is an absent mother."³²

As economic and judicial pressure³³ continued to exercise a moderating influence, the bans against female teachers with children generally disappeared, but they were replaced by mandatory maternity-leave

³¹ Quoted in Brubacher, *The Judicial Status of Marriage and Maternity as an Obstacle to the Education of Women for Professional Careers in Public School Teaching*, XXVI School and Society 428, 433 (1927).

³² *Ibid.*

³³ An early New York decision, rejecting the right of a school board to terminate a pregnant woman on account of "neglect of duty" due to absence, stated: "The policy of our laws favors marriage and the birth of children, and I know of no provision of our statute law or any principle of the common law which justifies the inference that a public policy which concededly sanctions the employment of married women as teachers treats as ground for exclusion the act of a married woman in giving birth to a child. . . . It is pure sophistry to argue, as does the learned counsel for the respondent in his brief, that maternity is an indication of health and, therefore, can not be said to cause 'serious personal illness.'"³⁴ *People ex rel. Peixotto v. Board of Education*, 82 Misc. 684, 692, 144 N.Y.S. 87 (Sup. Ct. 1913).

provisions exemplified by the present cases. A 1932 NEA report stated that "Such provisions are designed . . . to meet the *usual objections to permitting a woman to remain in the classroom after pregnancy becomes evident and while the child still needs most of her attention.*"³⁴ (Emphasis added.) By 1948, about half of all public schools had replaced their bans on employing mothers as teachers with mandatory maternity-leave rules identical to those in effect today.³⁵

It is thus apparent that today's mandatory maternity-leave policies are directly descended from earlier discriminatory policies, which initially banned married women, and later women with children, from teaching in the public schools. The notion that it is inappropriate or unseemly for a married woman to be a teacher, or that a mother is incapable of both pursuing a teaching career and discharging her family responsibilities, seems strange and archaic today. Yet essentially identical justifications are still offered for rules which require pregnant teachers to cease working at an early stage of pregnancy, or which prevent such teachers from returning to work for a specified period after childbirth. Policies with such tainted roots, we submit, should be examined with extreme suspicion.

³⁴ Administrative Practices I, *supra* note 22, at 20.

³⁵ Between 1948 and 1966, the number of school systems which established leaves in place of termination for pregnancy increased from 57 per cent to 89 per cent. The leave and return dates established in the earlier maternity-leave policies were largely followed in the later ones, and no effort was made to revise them in accordance with more modern medical opinion and practice. Compare NEA Research Div., Maternity Leave Provisions in 157 School Systems, in Cities over 30,000 Population 2 (Educational Research Service Circular No. 6, 1948) with ERS 1966 Circular, *supra* note 2, at 1.

II

**MANDATORY MATERNITY-LEAVE POLICIES CONTRIBUTE TO
AND REINFORCE A GENERAL PATTERN OF DISCRIMINATION
AGAINST WOMEN IN THE TEACHING PROFESSION**

Maternity-leave policies of the type at issue here have a serious adverse impact on the careers of women teachers. Such policies contribute to and reinforce the already disadvantageous position in which women teachers find themselves *vis-a-vis* their male counterparts.

**A. Current Patterns of Discrimination Against
Female Teachers**

Despite their large numbers and long-time participation in the profession, women are still discriminated against in the public schools. For example, as of the 1972-73 school year, women comprised 62.8 per cent of all full-time public school professional personnel; yet only 13.5 per cent of principals, 12.5 per cent of assistant principals, 6.2 per cent of deputy and associate school superintendents, 5.3 per cent of assistant school superintendents, and 0.1 per cent of school superintendents were women.³⁶ The small number of women in better-paid administrative positions is particularly striking in view of the fact that a higher percentage of women than men in the profession have 20 years or more of full-time teaching experience³⁷ and 15 years or more in their present school systems.³⁸

³⁶ NEA Research Div., 26th Biennial Salary and Staff Survey of Public School Professional Personnel, 1972-73, at 9 (Research Rep. 1973-R5, 1973) [hereinafter cited as Research Rep. 1973-R5].

³⁷ 18.9 per cent of women and 12.7 per cent of men. NEA Research Div., Teacher Opinion Poll XV (1973) (unpublished data, submitted to U.S. Bureau of the Census).

³⁸ 15 per cent of women and 13.5 per cent of men. *Ibid.*

Moreover, despite their greater seniority, the average annual salary of female classroom teachers in 1972-73 was almost 10 per cent less than for men in comparable positions.³⁹ Even in those few positions in the profession where women comprise the highest percentage of personnel (91.8 per cent of school librarians and 98.6 per cent of school nurses)⁴⁰, similar or sharper salary differentials obtained: the average salary of female school nurses was \$9,218, compared to \$10,059 for male school nurses; the average salary of female school librarians was \$10,352, while the figure for their male counterparts was \$11,828—a differential of almost 15 per cent.⁴¹

This pattern of discriminatory treatment of women in regard to salary and promotion to administrative positions is a long-standing one, and appears to have originated with the desire, referred to above (*see* p. 13 *supra*), to “de-feminize” the schools and encourage men to enter the profession. In 1930, 42 per cent of junior high schools and 54.8 per cent of senior high schools reported a policy of paying men teachers a higher salary than they paid women of equal training and experience.⁴² A typical school board policy of that period stated:

The Board of Education believes that a considerable per cent of the teachers in the upper grades

³⁹ \$9,787 for women, \$10,654 for men. Research Rep. 1973-R5, *supra* note 36, at 13.

⁴⁰ *Id.* at 9.

⁴¹ *Id.* at 13.

⁴² *Administrative Practices Affecting Classroom Teachers, Part II: The Retention, Promotion, and Improvement of Teachers*, 10 NEA Research Bull. 33, 42-3, (1932) [hereinafter cited as *Administrative Practices II*].

and in the high school should be men, and having found from experience that they are more difficult to obtain, reserves the right to pay an additional amount above the schedule when necessary to secure the services of exceptionally well-qualified men for the grades mentioned.⁴³

We believe that the same basic attitudes and motives which led to the adoption of these overtly discriminatory policies also underlay the mandatory maternity-leave policies, which developed at approximately the same time. But whatever the original motives for the adoption of these policies, it is clear that their continued operation perpetuates and exacerbates the general pattern of discrimination against women which still prevails in most school systems.

B. The Practical Effects of Mandatory Maternity-Leave Policies

In order to measure the impact of mandatory maternity-leave rules, it is necessary to compare the treatment of teachers under those rules with the treatment such teachers would receive if pregnancy were covered by the leave policies applicable to other forms of temporary physical disability.⁴⁴ The basic difference (although, as we shall see, not the only one) is that the maternity-leave policies prescribe a fixed

⁴³ Quoted in Morris, *The Single Salary Schedule* 69 (Teachers College Contributions to Education, No. 413, 1930). A 1932 NEA report on teachers' salaries stated: "Probably no other factor affecting teachers' salaries has received so much attention as the question of whether men and women . . . shall be paid the same salary." *Administrative Practices II*, *supra* note 42, at 42.

⁴⁴ Unless otherwise noted, the comparisons discussed in this section are based on a 1965-66 NEA survey of over 12,000 school systems with enrollments of 300 students or more. NEA Research Div., *Leaves of Absence for Classroom Teachers, 1965-66* (Research Rep. 1967-R5, 1967) [hereinafter cited as Research Rep. 1967-R5].

period of absence, while normal sick-leave policies require teachers to leave work only when they are physically incapable of performing their jobs, and permit them to return as soon as they are able.⁴⁵

The immediate result of this difference in treatment is that the pregnant teacher is forced to suffer a much greater loss of salary than she would if normal sick-leave policies were applied. Not only is she required to leave work at a prescribed stage of pregnancy, even if she is still capable of continuing to work, but she is also usually not permitted to return for a specified period of time after childbirth. Moreover, in most cases she is required to wait until the commencement of a new school term or year—or even longer, if no vacancy is available at that time.⁴⁶ As a result, the teacher frequently loses an entire year's salary or more, although she may actually be disabled for only a few weeks.⁴⁷ In addition

⁴⁵ Compare *id.* at 14 ff with *id.* at 20 ff; see generally NEA Research Div., Paid Leave Provisions for Teachers in Negotiation Agreements (Research Rep. 1969-R9, 1969); ERS 1966 Circular, *supra* note 2.

⁴⁶ See n.14, *supra*. The Cleveland Board of Education requires a teacher to wait until "the beginning of the regular school semester which follows the child's age of *three (3) months*." (A. 39-40a, No. 72-777.) The Chesterfield School Board rule does not guarantee the returning teacher a position until the beginning of the school year following her eligibility to return, such eligibility to be granted upon authorization from her physician and "when she can give full assurance that care of the child will cause minimal interference with job responsibilities." (A. 21, No. 72-1129.)

⁴⁷ Commenting on an eminent anthropologist's finding that in many societies, women take much less time—from one hour to five days—to return to their normal chores, a district court has pointed out:

This tends to suggest that the defendant Board's very solicitous treatment of pregnancy, including the requirement

to the loss of salary, such fringe benefits as life and health insurance, social security coverage, and payments to retirement programs are also suspended during the term of most maternity leaves.⁴⁸

It is also significant that 98.7 per cent of all school systems continue the payment of salaries and fringe benefits for a specified period during sick leave, and 91 per cent permit teachers to accumulate their sick leave allowance from year to year.⁴⁹ Moreover, 52.2

that the new mother not return to her job for one year following delivery is more a manifestation of cultural sex role conditioning than a response to medical fact and necessity. The fact that Mrs. Heath does not fit neatly into the stereotyped vision the defendant Board has of the "correct" female response to pregnancy should not redound to her economic or professional detriment. *Heath v. Westerville Board of Education*, 345 F.Supp. 501, 505-06 n.1 (S.D. Ohio 1972).

⁴⁸ Research Rep. 1967-R5, *supra* note 44, at 26; ERS 1966 Circular, *supra* note 2, at 15. The South Butler County, Pennsylvania, schools, for example, provide that a teacher on maternity leave "shall not be entitled to any fringe benefit under the provisions of any contract and the Board of School Directors shall not be required to make any contribution towards the retirement fund, insurance programs, etc., during the period of said leave of absence." Contract between South Butler County School District and South Butler County Education Association, App. C (1973-76). The Chesterfield County rule provides for the retention but not accumulation, during maternity leave, of "all personnel benefits accrued, including seniority" (A. 21, No. 72-1129).

⁴⁹ 62.9 per cent of the schools surveyed provided between ten and 14 days annually for paid sick leave. The median number of days available under provisions for paid sick leave was 12.3 per year, cumulative to 69.2. Research Rep. 1967-R5, *supra* note 44, at 16-17. Chesterfield County provides 10 days annually (A. 62, No. 1129); Cleveland provides 15 days, cumulative to 240. Agreement between Board of Education of Cleveland City School District and Cleveland Teachers Union, Local 279, art. VI, § 4 (1971).

per cent allow teachers to use their sick leave allowance for absences due to illness in their immediate families, 47.4 per cent for deaths in the family, and 19.9 per cent for personal business.⁵⁰ No schools in the 1956-66 survey, however, permit sick-leave allowance to be used for maternity or maternity-related illnesses.⁵¹ Whether or not this practice of paying teachers on normal sick leave while withholding salary and other benefits from teachers on maternity leave is a constitutional one—this question is not now before the Court—it certainly tends to exacerbate the financial losses which pregnant teachers are forced to suffer by virtue of the mandatory maternity-leave policies which are in issue here.⁵²

⁵⁰ A smaller percentage of schools permitted sick leave allowances to be used for court summons, jury duty, religious holidays, professional meetings, visiting other schools and military reserve duty. Research Rep. 1967-R5, *supra* note 44, at 19. A few school systems allow a male teacher to use his sick leave allowance when his wife gives birth, or provide, for example, that "A husband may be granted leave without loss of pay on the day his wife gives birth", while prohibiting a female teacher from using sick leave allowance when *she* gives birth. Mt. Diablo Unified School District (Concord, Calif.), Faculty Handbook § 4152.01-1 (1972-73). See also ERS 1966 Circular, *supra* note 2, at 24.

⁵¹ 70.9 per cent of the schools surveyed provided unpaid maternity leave, and the remainder had no provision for maternity leave. Research Rep. 1967-R5, *supra* note 44, at 20.

⁵² Despite the fact that compensation is continued during normal sick leave but denied during maternity leave, almost all maternity-leave rules require a physician's statement confirming the pregnancy and expected date of birth, but only 4.3 per cent of school districts routinely require a teacher to verify with a physician's statement that an absence was due to illness. In most cases (64.5 per cent), proof of illness is only required in unusual circumstances, such as where there have been excessive absences or absences exceeding a stipulated number of days. Research Rep. 1967-R5, *supra* note 44, at 18.

The immediate financial loss, however, is only a part of the injury which results from treating pregnancy differently from other disabilities. In most cases, a teacher who returns from maternity leave, unlike a teacher who returns from sick leave, is not guaranteed assignment to the same job which she had when she left.⁵³ Instead, she may be forced to accept a job with lower pay, or to teach a subject other than the one for which she was trained or in which she has a particular interest. This problem is particularly acute with respect to those fields which are taught by only a few teachers in a school system, such as certain foreign languages, speech therapy, special education, etc. Many teachers accept a position with a particular school system primarily because it offers an opportunity to teach a particular subject, and the loss of that opportunity can be a serious blow to the teacher's career plans.

Furthermore, the large majority of maternity-leave rules deny longevity credit for pay purposes for the period of maternity leave (but not sick leave)⁵⁴, so that the teacher must return to work at the same rate of pay which she had when she left. Since most teacher salary scales provide for annual increases, the denial of credit for the period of leave means that

⁵³ 96 per cent of the schools in the 1966 survey do not guarantee to the returning teacher her former position. ERS 1966 Circular, *supra* note 2, at 5. In Cleveland, a teacher "shall have priority in reassignment to a vacancy for which she is qualified under her certificate . . ." (A. 40a, No. 72-777). In Chesterfield County, a teacher is entitled to an offer of "re-employment for the first vacancy that occurs." (A. 21, No. 72-1129.)

⁵⁴ See ERS 1966 Circular, *supra* note 2, at 5, 6-16; Research Rep. 1967-R5, *supra* note 44, at 25.

the teacher is *permanently* one step below where she would otherwise be on the pay scale.

Seniority is also generally suspended for the period of maternity leave, but continued during sick leave.⁵⁵ Among other things, seniority affects promotional opportunity, reductions-in-force, retirement and other fringe benefits. Moreover, to the extent that promotion is based on personal evaluation—as is the case in most school systems—the teacher on maternity leave is likely to lose a year's evaluations, in addition to the year's experience and training which might be expected to improve her teaching abilities.

Of particular significance is the adverse effect which mandatory maternity-leave policies have upon the opportunities available to *all* female teachers of childbearing age for promotion to administrative posts. The lengthy absence required by the regulations precludes the fulfillment of administrative duties, and those responsible for administrative appointments must consider the possibility of a candidate's prospective pregnancy in evaluating her for promotion. Whatever other reasons may account for the dearth of women in administrative positions, forced maternity-leave rules must surely play a significant role.

Lastly, the very term "leave" is itself often a misnomer, since many school systems permit a teacher to return only at the discretion of the school officials⁵⁶

⁵⁵ See ERS 1966 Circular, *supra* note 2, at 5.

⁵⁶ For example, as of 1966 the Evansville Vandenburg School Corporation, Indiana, provided for the return of the teacher "if the Board of School Trustees, in its discretion, thinks that her return is wise." ERS 1966 Circular, *supra* note 2, at 19.

or, as in the case of the Chesterfield County School Board, grant maternity leave "only to those persons who have a record of satisfactory performance." (A. 20, No. 77-1129.) "Maternity leave" thus provides a convenient means of terminating a teacher without sufficient grounds⁵⁷ and without the procedural due process applicable to terminations for cause.⁵⁸ In addition, many school systems explicitly prohibit maternity leave and require termination of a pregnant teacher's employment contract,⁵⁹ and one-third of the school systems which grant maternity leave require tenure status for eligibility.⁶⁰ Thus, unlike other forms of temporary disability, maternity means the end of a teacher's employment in a significant number of school systems.

The adverse effects of mandatory maternity-leave policies would be eliminated, or at least greatly ameliorated, if pregnancy were treated like any other form of temporary disability. We submit that there is no valid reason for treating pregnancy differently from any other temporary disability, and that such disparate treatment cannot be justified under either a "strict" or "permissive" application of the Equal-Protection Clause.

⁵⁷ See, e.g., *Cerra v. School District*, 450 Pa. 207, 299 A.2d 277, 5 FEP 480, 481-2 (Pa. 1973).

⁵⁸ See, e.g., *Board of Regents v. Roth*, 408 U.S. 564 (1972).

⁵⁹ 11 per cent of school systems with enrollments of 25,000 or more students, ERS 1966 Circular, *supra* note 2, at 1; 29.1 per cent of school systems with enrollments of 300 or more. Research Rep. 1967-R5, *supra* note 44, at 20.

⁶⁰ ERS 1966 Circular, *supra* note 2, at 2. The Cleveland schools require a full year's employment for eligibility. (A. 42a-43a, No. 72-777.)

CONCLUSION

For the reasons stated, the *amici curiae* believe that the judgment in No.72-777 should be affirmed and the judgment in No. 72-1129 should be reversed.

Respectfully submitted,

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Nos. 72-777, 72-1129

IN THE
Supreme Court of the United States
OCTOBER TERM, 1972

CLEVELAND BOARD OF EDUCATION, et al., *Petitioners*,
v.

JO CAROL LA FLEUR, et al., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

SUSAN COHEN, *Petitioner*,
v.

CHESTERFIELD COUNTY SCHOOL BOARD, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Fourth Circuit

MOTION OF INTERNATIONAL UNION OF ELECTRICAL,
RADIO AND MACHINE WORKERS AFL-CIO-CLC,
FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE
and

BRIEF OF INTERNATIONAL UNION OF ELECTRICAL,
RADIO AND MACHINE WORKERS, AFL-CIO-CLC,
AS AMICUS CURIAE

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TABLE OF CONTENTS

	Page
MOTION OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE	1
Applicant's interest	2
Questions of fact and law which have not been, and probably will not be, adequately presented by the parties	4
BRIEF OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, AS AMICUS CURIAE	7
Interest of amicus	7
Opinion below	14
Questions presented	15
Statement	15
Summary of argument	17
Argument	18
Introduction	18
I. There is no medical basis for a rule which requires a female employee because she has reached a specified month of pregnancy and without regard to her actual physical con- dition to cease work at any time prior to the onset of labor	23
II. State action which denies a person of the right to work and continue to be paid her salary solely because she is pregnant, when she is fully able to perform all the duties of her job as if she were not pregnant, vio- lates the due process and equal protection of the Fourteenth Amendment	34

	Page
III. The practice of an employer which requires a female employee to be absent from work without pay on account of pregnancy and childbirth for a longer period than is medically necessary constitutes an unreasonable impediment to the ability of the female to compete in employment with males	46
Conclusion	47
—	
APPENDIX A: Excerpts from Testimony of Dr. Andre E. Hellegers before Federal Communications Commission	1a
APPENDIX B: Curriculum Vitae of Dr. Andre E. Hellegers	11a
APPENDIX C: Excerpts from Testimony of Dr. Andre E. Hellegers in <i>Avery v. General Railway Signal</i> , New York State Division of Human Rights, Case Nos. CS-27503-72, etc.	13a
APPENDIX D: Excerpts from Testimony of Dr. John C. Donovan	28a
APPENDIX E: Curriculum Vitae of Dr. John C. Donovan	37a
APPENDIX F: Excerpts from Deposition of Dr. George Wilbanks	41a
APPENDIX G: Curriculum Vitae of Dr. George Dewey Wilbanks, Jr.	48a
APPENDIX H: Excerpts from Deposition of Dr. William C. Keetels	51a

Table of Contents Continued

iii

AUTHORITIES CITED

CASES:	Page
Acme Electric Corp., Cuba, N. Y., N.Y.S.D.H.R. Case No. CS-26530-72	3, 13
Aiello v. Hansen, DLR 6-8-72 (No. 111) p. D-1, U.S. D.C. N.D. Calif. 1973	36
Allis Chalmers, EEOC Case Nos. TNO 2-0543, TNO 2-0547, TNO 2-0548	3, 13
Alwin Mfg. Co., 38 LA 632 (1962)	9
American Machine & Foundry Co., 38 LA 1085 (1962)	42
American Safety Razor, EEOC Case No. TDC 2-0877	3, 13
American Technical, Inc., EEOC Case No. TME 3- 1282	3, 13
Avery v. General Railway Signal Co., N.Y.S.D.H.R. Case Nos. CS-27503-72 etc.	3, 13, 28
Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969)	44
Bravo v. Board of Education City of Chicago, 345 F. Supp. 155 (N.D. Ill. 1972)	45
Buckley v. Coyle Public School System, 476 F.2d 92, 5 FEP Cases 773 (10th Cir. 1973)	45
Butcher's v. Crescent City, 111 U.S. 746 (1884)	34
Carrington v. Rash, 380 U.S. 89, 96 (1965)	45
Cerra v. East Stroudsburg Area School District, 299 A.2d 277, 5 FEP Cases 480 (Pa.Supp.Ct. 1973) ...	46
Cheatwood v. South Central Bell Tel. & Tel. Co., 303 F.Supp. 754, 2 FEP Cases 33 (M.D. Ala. 1969) ..	18, 44
Chrysler, Inc., EEOC Case Nos. TCB 0073, TCB 0144	3, 13
Copeland Refrigerator Corp., EEOC Case No. TCL 2- 0828	3, 13
Danielson v. Board of Higher Education, 4 FEP Cases 885 (U.S.D.C.S.D.N.Y. 1972)	35

	Pag
EEOC Decision No. 71-413, CCH-EEOC Dec. Par. 6204 (1970)	1
EEOC Decision No. 71-1474, CCH-EEOC Dec. Par. 6221 (1971)	1
EEOC Decision No. YCL 1246 (1971)	1
EEOC Decision No. YDC3-093 (1973)	3
Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029 (1972)	3
Electronic Control, W.Va. S.H.R.Div., Case No. TP 13-0659	3, 1
Franklin v. Stromberg-Carlson Corp., N.Y.S.D.H.R. Case Nos. CS-27069-72, etc.	4, 13, 2
Garner v. Stephens, Civil No. 6835 (N.D. Ky. Dec. 1, 1972)	4
Gem Electric Co., Inc., 11 LA 684 (1948)	9, 3
General Electric Co., 28 War Lab. Rep. 666 (1945) ...	8
Gilbert v. General Electric Co., 5 FEP Cases 989 (U.S. D.C.E.D.Va. 1973)	3, 13, 28, 3
Gilbert v. General Electric Co., EEOC Decision No. YDC3-093 (1973)	
Green v. Waterford School Board, 473 F.2d 629 (2nd Cir. 1973)	4
Griggs v. Duke Power Co., 401 U.S. 424 (1971)	4
Grogg v. General Motors Corp., U.S.D.C.S.D.N.Y. 73 Civ. 63	2, 13, 37, 3
Heath v. Westerville Board of Education, 345 F.Supp. 501 (S.D. Ohio 1972)	4
Heinen v. Johnston Community School District, Iowa Civil Rights Commission (1972)	3
IUE v. Westinghouse Electric Corp., 55 LRRM 2952 (U.S.D.C.S.D.N.Y. 1964)	9
Iorio v. Board of Review, 88 N.J.Super. 141, 211 A.2d 206 (1965)	3

Table of Contents Continued

v

	Page
Jordan v. Meskill, U.S.D.C.D.Conn., Civ. Action No. 15,671 (1973)	36
Kupczyk v. Westinghouse Electric Corp., N.Y.S.D.H.R. Case No. CSF 15206-67 (1969) EPG Par. 2600B.37	9
Magnavox, EEOC Case No. B168-5-1083E	4, 13
Mann v. Allis Chalmers Mfg. Co., U.S.D.C.S.D.Ohio W.D. Civil Action No. 8115	11
Mann v. Allis Chalmers Mfg. Co., EEOC Case No. TCLO 1015, EEOC Decision No. YCL 1246	11
Middleton Board of Education, 56 LA 830 (1971)	42
Monell v. Department of Social Services, 4 FEP Cases 883 (S.D.N.Y. 1972)	46
Muller v. Oregon, 208 U.S. 412 (1908)	18
National Lead Co., 18 LA 528 (1952)	9, 42
Orner v. Board of Appeals, Superior Court of Baltimore, Case No. 132,572	36
Phillips v. Martin Marietta Corp., 400 U.S. 542, 91 S.Ct. 496 (1971)	10
Pocklington v. Duvall County School Board, 345 F. Supp. 163 (N.D. Fla. 1972)	45
Reed v. Reed, 404 U.S. 71 (1971)	45
Republic Steel Corp., 37 LA 367 (1961)	9, 42
Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971)	44
Southgate Community School District, 57 LA 476, 478 (1971)	42
Truax v. Raich, 239 U.S. 33 (1915)	34
United Screen and Bolt Co., 17 War Lab. Rep. 232 (1944)	8, 18
Wagner Electric Co., EEOC Case Nos. TSL 3-552, TSL 30-193	4, 13
Washington Publishers Assn., 39 LA 159 (1962)	42

	Page
Weeks v. Southern Bell Telephone Co., 408 F.2d 228 (5th Cir. 1969)	44
Westinghouse Electric Corp., 45 LA 621 (1965)	8, 10
Westinghouse Electric Corp., EEOC Case No. TPB 0190	4, 9, 13
Williams v. San Francisco Unified School District, 340 F.Supp. 438	45
 CONSTITUTION, STATUTES AND REGULATIONS:	
Alaska, F.E.P. 451:54	10
Arizona, F.E.P. 451:101	10
California Unemployment Insurance Code § 2626	36
California, F.E.P. 451:127	10
Civil Rights Act of 1871, 42 U.S.C. 1983	16
Civil Rights Act of 1964, Title VII, as amended, 42 U.S.C. 2000e	3, 9, 10, 13, 14, 18, 39
Colorado, F.E.P. 451:178	10
Connecticut, F.E.P. 451:203	10
Constitution of the United States: Fourteenth Amendment	4, 13, 14, 15, 16, 36, 40
Delaware, F.E.P. 451:226	10
District of Columbia, F.E.P. 451:261	10
Equal Employment Opportunity Commission, Guide lines on Discrimination Because of Sex, 29 C.F.R. 1604.10	14, 21, 38
Executive Order of the President, No. 11,246, 3 C.F.R. 339	22
Hawaii, F.E.P. 451:285	10
Idaho, F.E.P. 451:302	10
Illinois, F.E.P. 451:325	10
Illinois Sex Discrimination Guidelines, Section X, CCH-EPG Par. 23,820.08	22, 38

Table of Contents Continued

vii

	Page
Indiana, F.E.P. 451:375	10
Iowa, F.E.P. 451:403	10
Kansas, F.E.P. 451:432B	10
Maryland, F.E.P. 451:530	10
Maryland Sex Discrimination Guidelines, Section 8, F.E.P. 451:541	22, 38
Massachusetts, F.E.P. 451:553	10
Michigan, F.E.P. 451:578	10
Michigan Atty. Gen.'s Opinion, February 18, 1972, CCH-EPG Par. 5051	36
Minnesota, F.E.P. 451:675	10
Minnesota Sex Discrimination Guidelines, Section 51c, CCH-EPG Par. 21,490.05	22, 38
Missouri, F.E.P. 451:675	10
Montana, F.E.P. 451:701	10
Nebraska, F.E.P. 451:726	10
Nevada, F.E.P. 451:752	10
New Hampshire, F.E.P. 451:775	10
New Jersey, F.E.P. 451:805	10
43 N.J. Stat. Ann. Secs. 25, 39(c)	36
New Mexico, F.E.P. 451:853	10
New York State Human Relations Act, Section 296, Art. 15, N.Y. Executive Law, Ch. 119, F.E.P. 451:876b	9, 10
Oklahoma, F.E.P. 451:965	10
Oregon, F.E.P. 451:978	10
Pennsylvania, F.E.P. 451:102	10
Pennsylvania Sex Discrimination Guidelines, as amended December 20, 1971, CCH-EPG Par. 27,296.02	22, 38

	Page
Railroad Unemployment Insurance Act, 45 U.S.C. 351	36, 40
Rhode Island Gen. Laws, Sec. 28-41-8	36
Utah, F.E.P. 451:1153	10
Vermont, F.E.P. 451:1175	10
Washington, F.E.P. 451:1229	10
Washington Sex Discrimination Guidelines WAC 162- 30-020(5) CCH-EPG 28574(4)	22, 38
West Virginia, F.E.P. 451:1255	10
Wisconsin, F.E.P. 451:1275	10
Wisconsin Sex Discrimination Guidelines, CCH EPG Par. 29,100	22, 38
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114 Cong. Rec. 218	41
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Table of Contents Continued

ix

Page

Prentice-Hall, Personnel Management Policies and Practices, Report Bulletin 25, Vol. XIX (19721) ..	9
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-777

CLEVELAND BOARD OF EDUCATION, et al., *Petitioners*,

v.

JO CAROL LA FLEUR, et al., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

No. 72-1129

SUSAN COHEN, *Petitioner*,

v.

CHESTERFIELD COUNTY SCHOOL BOARD, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Fourth Circuit

MOTION OF INTERNATIONAL UNION OF ELECTRICAL,
RADIO AND MACHINE WORKERS, AFL-CIO-CLC, FOR
LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 42(3) of the Rules of this Court,
the International Union of Electrical, Radio and

Machine Workers, AFL-CIO-CLC, hereinafter called IUE, respectfully moves this Court for leave to file a brief as amicus curiae in support of the respondents in Case No. 72-777 and in support of the petitioner in Case No. 72-1129. Written consent to the filing of such brief has been requested of all parties and granted by the respondents in Case No. 72-777 and the petitioner in Case No. 71-1129, but consent has been refused by the petitioners in Case No. 72-777 and by the respondents in Case No. 72-1129.

APPLICANT'S INTEREST

1. The applicant is an international labor organization which has as members, and represents, more than 100,000 women employed in the electrical equipment manufacturing industry.
2. During the past two years the IUE has been engaged in negotiations with approximately 400 employers in an effort to obtain collective bargaining provisions which would assure each female employee the right to continue to work at her usual job during pregnancy for as long as she is able to perform her job without injury to herself or her future offspring and the right to be accorded the same terms and conditions of employment as any other disabled employee during any period she is unable to work because of childbirth or other pregnancy-related disability.
3. The IUE is a party plaintiff in the following two cases pending in the federal district courts presenting issues which may be materially affected by the decision in this case: *Grogg v. General Motors Corp.*, U.S.D.C. S.D.N.Y. 73 Civ. 63, involving the issue of whether requiring all pregnant employees to go on unpaid ma-

ternity leave at the end of the seventh month of pregnancy, even though not then disabled, and failing to pay sickness and accident benefits for periods of absence for childbirth or other pregnancy-related disabilities on the same basis as are paid for absences due to other disabilities, constitute discrimination because of sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e; *Gilbert v. General Electric Co.*, 5 FEP Cases 989 (U.S.D.C.E.D. Va. 1973) involving a similar sick pay issue, with respect to which the EEOC found reasonable cause to believe that GE had engaged in discrimination because of sex. EEOC Decision No. YDC3-093 (May 18, 1973). 1973).

4. In addition to the above described cases, the IUE, its affiliated local or a member, with the assistance of the IUE, has filed, and there are presently pending, the following charges of discrimination because of sex with the Equal Employment Opportunity Commission or a state fair employment practice agency which raise one or more related issues respecting unpaid leave for periods of absence from work because of childbirth or other pregnancy-related disability; *Acme Electric Corp.*, Cuba, N.Y., N.Y. Division of Human Rights Complaint Case No. CS-26530-72; *Allis Chalmers*, Little Rock, Ark., EEOC Case Nos. TNO 2-0542, TNO 2-0547, TNO 2-0548; *American Safety Razor*, Staunton, Va., EEOC Case No. TDC-2-0877, TDC-2-0925; *American Technical, Inc.*, Lexington, Ky., EEOC Case No. TME 3-1282; *Avery v. General Railway Signal Co.*, N.Y. Division of Human Rights Complaint Cases No. CS-27503-72, etc.; *Chrysler, Inc.*, Dayton, Ohio, EEOC Case Nos. TCB 0073, TCB 0144; *Copeland Refrigerator Corp.*, Sidney, Ohio, EEOC Case No. TCL 2-0828; *Electronic Control*, Monogah, W.Va.,

West Virginia State Human Rights Division Case No. TP 13-0659; *Franklin v. Stromberg-Carlson Corp.*, N.Y. Division of Human Rights, Complaint Cases Nos. CS-27069-72, etc., *Magnavox*, Norristown, Tenn., EEOC Case No. B168-5-1083-E; *Wagner Electric Co.*, St. Louis, Mo., EEOC Case Nos. TSL 3-552, TSL 30-193; *Westinghouse Electric Corp.*, EEOC Case No. TPB 0190.

QUESTIONS OF FACT AND LAW WHICH HAVE NOT BEEN AND PROBABLY WILL NOT BE ADEQUATELY PRESENTED BY THE PARTIES

The IUE believes that the following questions of fact and law have not been, and there is reason to believe they will not be, adequately presented in the briefs of the parties.

1. Whether there is any medical basis for a rule which requires a female employee because she has reached a specified month of pregnancy and without regard to her actual physical condition, to cease work at any time before the onset of labor.

2. Whether state action which denies a female the right to work and continue to be paid her salary solely because she is pregnant, when she is as fully able to perform all the duties of her job as if she were not pregnant, violates the due process and equal protection clauses of the Fourteenth Amendment.

3. Whether the practice of an employer which requires a female employee to be absent from work without pay on account of pregnancy and childbirth for a longer period than is medically necessary constitutes an unreasonable impediment to the ability of the female to compete in employment with males.

The IUE has reason to doubt the adequacy of the presentation of the foregoing questions. We do

not underrate the excellent briefing ability of other counsel but merely suggest that the IUE, because of its extensive experience with these problems, may be able to assist this Court with a type of presentation not available to other counsel.

The questions of law and fact which the IUE desires to brief are relevant. The Brief for Petitioners in No. 72-777, pp. 5-10, 13, 23-24, 25-26, 36-39, 41-66 rests primarily on the contention that a pregnant woman is not as able bodied as a non-pregnant woman. The brief of IUE will show there is no medical basis for this position. The court of appeals in No. 72-1129 rested its decision primarily on the erroneous assumption that there is no effect in competition between males and females in employment, of refusing to permit females who are pregnant to be gainfully employed. The brief of amicus curiae will demonstrate that employer policies denying females continuity of employment and tenure affect all aspects of their competition with males as to wage rates, jobs, training, promotions and fringe benefits.

For the foregoing reasons it is respectfully urged that this Court grant the IUE leave to file a brief as amicus curiae.

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July 31, 1973

IN THE
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No. 72-777

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RADIO AND MACHINE WORKERS, AFL-CIO, AS
AMICUS CURIAE

INTEREST OF AMICUS

The International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, hereinafter called IUE, is an international labor organization composed

of employees of manufacturers of electronic products and equipment, electrical machinery, appliances and products, machine tools and allied products. The IUE has more than 100,000 female members.

One of the primary objectives of IUE in its representation of its female members has been the elimination and correction of sex discrimination. In its efforts to secure equality and promotions for its female members, IUE has had to counter the employers' traditional attempts to justify paying females lower wages than males and denying females higher paying jobs on the ground that females were less valuable as employees than males because of the repeated and lengthy absences of females from the labor force in connection with child bearing and child rearing.¹ These same employers have been, to an undetermined extent, responsible for the transient qualities of the female labor force because they forced women out of jobs when they become pregnant,² terminated all their sen-

¹ In *General Electric Company*, 28 War Lab. Rep. 666, 676, 671, 680, 686 (1945) proceedings instituted by the United Electrical, Radio and Machine Workers, the predecessor to the IUE, the War Labor Board quoted manuals used by GE and Westinghouse in setting wage rates which expressly provided for lower rates for work when performed by females because females were allegedly "transient" employees. Similarly, see the reference to child bearing in the justification for sex discrimination in fixing of wage rates in *United Screen and Bolt Co.*, 17 War. Lab. Rep. 232, 235 (1944).

² See *Westinghouse Electric Corp.*, 45 LA 621 (P. Hebert, Arbitrator, 1965) in which the IUE made an unsuccessful attempt to get an arbitrator to sustain the grievance of a female with 19 years of seniority who tried to hide her pregnancy but was discharged on April 4, 1962 pursuant to the Company's policy to treat as a "voluntary quit" any employee who became pregnant. Westinghouse had refused even to submit the issue to arbitration and the IUE had obtained an order from the federal district court

iority rights³ and often kept them out for a number

compelling arbitration. *IUE v. Westinghouse*, 55 LRRM 2952 (U.S.D.C.S.D.N.Y. 1964). For contra arbitration awards see *Gem Electric Co., Inc.*, 11 LA 684 (Sidney Wolff, Arbitrator, 1948, prosecuted by IUE's predecessor UE); *Alwin Mfg. Co.*, 38 LA 632 (John F. Sembower, Arbitrator, 1962); *National Lead Co.*, 18 LA 528, 530 (Arthur Lesser, Jr., Arbitrator, 1952); *Republic Steel Corp.*, 37 LA 367 (Joseph G. Stashower, Arbitrator 1961). In *Kupczyk v. Westinghouse Electric Corp.*, the New York State Division of Human Rights, Case No. CSF 15206-67 (March 3, 1969, EPG Par. 26,000B.37 held that the discharge of an employee for pregnancy and subsequent refusal to reemploy her constituted discrimination in employment because of sex in violation of the New York State Human Relations Act, Section 296, Art. 15, N.Y. Executive Law, Ch. 119. The IUE has filed charges against Westinghouse, EEOC Case No. TPB 0190, which are still pending, in support of which IUE has submitted evidence to EEOC of a continuing practice of discharging or coercing the resignation of pregnant employees, including recent instances of employees who unsuccessfully tried to hide their pregnancy in order not to lose their jobs and their seniority. See Prentice-Hall, Personnel Management Policies and Practices, Report Bulletin 25, Vol. XIX, June 6, 1972, p. 457 reporting on the changes that have taken place since Title VII became effective and noting that prior thereto 3/5 of the offices and non-union plants denied maternity leave, which meant employees were discharged when they became pregnant.

³ See EEOC Decision No. 71-413, CCH-EEOC Dec. Par. 6204, November 5, 1970, holding that failure of an employer to recognize employee's date of original hire as her seniority date, and the employer's insistence that her seniority date was her date of reemployment following an absence for childbirth, constituted unlawful discrimination because of sex in violation of Title VII. The EEOC required restoration of her original date of hire as her seniority date. The Prentice Hall Survey of Maternity Leave Practices of over 1,000 employers conducted in 1965 shortly after Title VII took effect, showed that in many companies if a woman wanted to return to work after the birth of her baby, she was considered a "new hire" with no seniority rights. Prentice-Hall, Personnel Management Policies and Practices, Report Bulletin 25, Vol. XIX, June 6, 1972, p. 457.

of years thereafter by refusing to hire women with young children.⁴

Prior to the enactment of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, and the parallel state fair employment practice statutes,⁵ the IUE had attempted through collective bargaining and submission of grievances to arbitration to protect women against loss of jobs because of pregnancy.⁶ With the enactment of this legislation, IUE has through charges filed by the international union, affiliated locals or

⁴ See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 91 S.Ct. 496 (1971) where this Court held that refusal to hire women with pre-school age children constituted sex discrimination within the meaning of Title VII.

⁵ Thirty three states and the District of Columbia bar discrimination in employment because of sex. Alaska, F.E.P. 451:54; Arizona, F.E.P. 451:101, 103; California, F.E.P. 451:127; Colorado, F.E.P. 451:178; Connecticut, F.E.P. 451:203; Delaware, F.E.P. 451:226; District of Columbia, F.E.P. 451:261; Hawaii, F.E.P. 451:285; Idaho, F.E.P. 451:302; Illinois, F.E.P. 451:325; Indiana, F.E.P. 451:375; Iowa, F.E.P. 451:403; Kansas, F.E.P. 451:432b; Maryland, F.E.P. 451:530; Massachusetts, F.E.P. 451:553; Michigan, F.E.P. 451:578; Minnesota, F.E.P. 451:626; Missouri, F.E.P. 451:675; Montana, F.E.P. 451:701; Nebraska, F.E.P. 451:726; Nevada, F.E.P. 451:752; New Hampshire, F.E.P. 451:775; New Jersey, F.E.P. 451:805; New Mexico, F.E.P. 451:853; New York, F.E.P. 451:876b; Oklahoma, F.E.P. 451:965; Oregon, F.E.P. 451:978; Pennsylvania, F.E.P. 451:102; Utah, F.E.P. 451:1153; Vermont, F.E.P. 451:1175; Washington, F.E.P. 451:1229; West Virginia, F.E.P. 451:1255; Wisconsin, F.E.P. 451:1275; and Wyoming, F.E.P. 451:1302. Three states, Illinois, Pennsylvania, have ratified equal rights provisions which are included in their state constitutions.

⁶ See references to collective bargaining agreements negotiated by IUE to entitle employees disabled by pregnancy or childbirth to the same leave rights as are enjoyed by other disabled employees, in the opinion of the arbitrator in *Westinghouse Electric Corp.*, 45 LA 621, 624, 626, 629-630 (P. Hebert, Arbitrator, 1965), which as noted in fn. 2, p. 8, *supra*, was a case in which the IUE submitted this issue to arbitration.

members, and by the filing of, or intervention in, law suits, made an effort to obtain rulings that all singling out of pregnancy for special treatment constitutes unlawful discrimination because of sex.⁷

Following the issuance of Judge Merhige of his decision in the *Cohen* case (No. 72-1129) on May 17, 1971, that mandatory maternity leave constituted discrimination because of sex and EEOC Decision No. 71-1474, CCH-EPG Par. 6221, on March 19, 1971 that the refusal of an employer to give sick pay to employees disabled by childbirth and complications of pregnancy on the same basis as it is paid to employees otherwise disabled similarly constituted unlawful sex discrimination, the IUE undertook a program aimed at securing the benefits of these decisions for the females it represented. As collective bargaining agent the IUE has during the past two years been engaged in negotiations with approximately 400 employers for the purpose of abolishing all mandatory maternity leave rules and securing to female employees the right to continue to work at their usual job until the onset of labor unless they were unable to perform effectively or it was medically determined that continued employment would be harmful to the employee, with an

⁷ E.g., *Mann v. Allis Chalmers Mfg. Co.*, Norwood, Ohio, EEOC Case No. TCLO 1015, EEOC Decision No. YCL 1246, February 24, 1971 holding that failure to grant a personal leave of absence for two weeks following the date of childbirth which was requested by her personal physician on her behalf as necessary for recuperation from childbirth constituted unlawful sex discrimination where a male employee had been granted approximately 13 months of leave of absence in order to undergo a series of back operations. IUE supported Mann's position in her court suit, *Mann v. Allis Chalmers Mfg. Co.*, U.S.D.C.S.D. Ohio W.D. Civil Action No. 8115, which was settled by stipulation of all the parties, after she was reinstated, her original seniority date restored and a sum of money paid in settlement of the back pay claim.

accompanying right to all the same benefits as other disabled employees for periods of disability due to childbirth or the complications of pregnancy.

With some employers, the IUE has been completely successful.⁸ Most employers have agreed with IUE to permit pregnant employees to continue working until such time as it is medically determined by either their own doctor or the employer doctor that for medical reasons they shall cease working, but have refused to accord them during the period of their absence from work on account of childbirth or other pregnancy-related disability, the same benefits as other disabled employees receive during their absence on account of disability. Still other employers have entered into standby agreements with the IUE making retroactive to the date of the signing of the agreements of rights of employees with respect to sick pay for periods of absence due to childbirth or other pregnancy-related disability should the courts in cases involving other employers make a final resolution of the issue in favor of pregnant employees.

IUE's lack of success as to other employers has resulted in the filing by IUE, its affiliated locals or members of charges with the Equal Employment Op-

⁸ E.g., Memorandum of Agreement, June 14, 1973, between IUE and ITT Electric Optical Products Division, Roanoke, Virginia plant, abolishing all mandatory maternity leave and entitling employees disabled by childbirth or pregnancy to the same weekly indemnity of \$50 up to 13 weeks maximum as available to any employee disabled by any other illness or accident; agreement of July 1, 1972 between IUE Local 502 and Airco Speer Carbon Graphite, St. Marys, Pa., same, except weekly benefits are \$55 but not in excess of 70% of basic weekly earnings; supplemental agreement between Local 932, IUE and Cooperative Services, Inc., Detroit, Mich., June 22, 1973, same except such benefits range from \$70 to \$130 per week up to a 26 week maximum; agreement between IUE Local 934 and Elcon Systems, Inc., Detroit, Mich., May 31, 1973, same as Cooperative Services.

portunity Commission, hereinafter called EEOC,⁹ and state fair employment practice agencies¹⁰ and the filing of suits in the federal district courts,¹¹ alleging that various policies and practices of employers in singling out pregnancy for special treatment constitutes unlawful sex discrimination in violation of Title VII or similar state law.

The IUE's interest is primarily in the private sector rather than the public sector. All of the cases in which IUE is involved arise under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e or similar state legislation, rather than under the Fourteenth Amendment. It is therefore possible that the instant cases could be decided by this Court on grounds which would not affect the interpretation and application of Title VII to the cases in which IUE is interested. However, all of the judges below framed the issue in the case in terms of a sex discrimination standard which might be equally applicable under both

⁹ *Allis Chalmers*, Little Rock, Ark., EEOC Case Nos. TNO 2-0543, TNO 2-0547, TNO 2-0548; *American Safety Razor*, Staunton, Va., EEOC Case No. TDC-2-0877, TDC-2-0925; *American Technical, Inc.*, Lexington, Ky., EEOC Case No. TME-3-1282; *Chrysler, Inc.*, Dayton, Ohio, EEOC Case Nos. TCB 0144; *Copeland Refrigerator Corp.*, Sidney, Ohio, EEOC Case No. TCL 2-0828; *Magnavox*, Norristown, Tenn., EEOC Case No. B168-5-1083E; *Wagner Electric Co.*, St. Louis, Mo., EEOC Case Nos. TSL 3-552, TSL 30-193; *Westinghouse Electric Corp.*, EEOC Case No. TPB 0190.

¹⁰ *Acme Electric Corp.*, Cuba, N.Y., N.Y.S.H.R. Case No. CS-26530-72; *Avery v. General Railway Signal Corp.*, N.Y. Division of Human Rights Case, Nos. CS-27503-72, etc.; *Electronic Control*, Monogah, W.Va., W.Va. State Human Rights Division Case No. TP 13-0659; *Franklin v. Stromberg-Carlson Corp.*, N.Y. Division of Human Rights Case Nos. CS-27069-72, etc.

¹¹ *Grogg v. General Motors Corp.*, U.S.D.C.S.D.N.Y. 73 Civ. 63; *Gilbert v. General Electric Co.*, 5 FEP Cases 989 (U.S.D.C.E.D. Va. 1973).

Title VII and the Fourteenth Amendment. The reasoning of the Fourth Circuit in the *Cohen* case although accompanied by a disclaimer of any intention to rule on the validity of the EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. 1604.10(a), insofar as it treated pregnancy as unique and not affecting competition between males and females, should it be affirmed by this Court, might well be deemed controlling with respect to the interpretation of Title VII. Similarly, the position briefed by the Cleveland School Board, if adopted by this Court, might be prejudicial to the pending cases involving pregnancy in which IUE is now involved as set forth above.

The IUE believes that sex equally with race constitutes a "suspect" or "invidious" classification for purposes of the Fourteenth Amendment. The IUE will not here brief this issue because it is convinced that the mandatory maternity leave policies here involved must be held unconstitutional under the Court's approved standards of testing the validity of sex discrimination for purposes of the Fourteenth Amendment.

OPINION BELOW

In the *La Fleur* case (72-777), the opinion of the United States Court of Appeals for the Sixth Circuit is reported in 465 F.2d 1184. The opinion of Judge James C. Connell in the District Court for the Northern District of Ohio, Eastern Division is reported in 326 F.Supp. 1208 (N.D. Ohio, 1971).

In the *Cohen* case (No. 72-1129), the opinion of the United States Court of Appeals for the Fourth Circuit is reported in 474 F.2d 395. The opinion of Judge Robert H. Merhige, Jr., in the United States District Court for the Eastern District of Virginia, Richmond Division, is reported at 326 F.Supp. 1159.

QUESTIONS PRESENTED

1. Whether there is any medical basis for a rule which requires a female employee, because she has reached a specified month of pregnancy and without regard to her actual physical condition, to cease work at any time before the onset of labor.

2. Whether state action which denies the right to work and continue to be paid her salary solely because she is pregnant, when she is as fully able to perform all the duties of her job as if she were not pregnant, violates the due process and equal protection clauses of the Fourteenth Amendment.

3. Whether the practice of an employer which requires a female employee to be absent from work without pay on account of pregnancy and childbirth for a longer period than is medically necessary constitutes an unreasonable impediment to the ability of the female to compete in employment with males.

STATEMENT

Three pregnant school teachers, Jo Carol La Fleur, a seventh grade teacher, (*La Fleur* pp. 4a, 37a-38a), Ann Nelson, a junior high school French teacher, (*La Fleur* pp. 28a, 38a, 45a) and Susan Cohen, a Senior High School Government teacher (*Cohen* A 13), were required to go on unpaid leave pursuant to rules adopted by their respective school boards several months prior to their expected delivery date, over their protests, supported by their personal physicians, that they were fully capable of performing their jobs for a longer period of time. The rules of the Cleveland Board of Education which were applied to plaintiffs La Fleur and Nelson, imposed a mandatory unpaid maternity leave of absence to be effective not less than

five months before the expected date of delivery and to continue until the beginning of the next regular semester following the three months age of the child (*La Fleur* p. 39a). The rules of the Chesterfield County School Board, which were applied to plaintiff Cohen, imposed a mandatory unpaid maternity leave of absence to be effective at least four months prior to the expected birth of the child with reemployment guaranteed no later than the first day of the school year following the date that the teacher is declared eligible for reemployment by a written notice from the physician that she is physically fit for full-time employment (see rules quoted 474 F. 2d at 396, fn. 2).

Each of the three pregnant school teachers instituted a suit under the Civil Rights Act of 1871, 42 USC 1983, alleging that the school authorities violated the equal protection clause of the Fourteenth Amendment by refusing because of her pregnancy to permit her to continue to teach when she was fully capable of performing her job and her personal physician had advised that she could continue to work.

Susan Cohen was successful in the district court. Judge Merhige, after a full trial on the merits, held that the defendant school board had violated the Fourteenth Amendment. He stated (326 F. Supp. at 1161):

"The maternity policy of the School Board denies pregnant women such as Mrs. Cohen equal protection of the laws because it treats pregnancy differently than other medical disabilities. Because pregnancy, though unique to women, is like other medical conditions, the failure to treat it as such amounts to discrimination which is without rational basis, and therefore is violative of the equal protection clause of the Fourteenth Amendment."

On appeal by the school board, the Fourth Circuit at first affirmed by a divided court and then on a rehearing en banc, again by a divided court, reversed. 474 F.2d 395.

The plaintiffs La Fleur and Nelson lost before the district court but were successful on their appeal to the Sixth Circuit, which by a divided court reversed the judgment of the district court. 465 F.2d 1184.

SUMMARY OF ARGUMENT

I. Today it is accepted medical practice that women may continue to work at their accustomed jobs throughout pregnancy and up to delivery. Recent studies have shown that women during their 24th to 35th week of pregnancy have a higher exercise efficiency than either non-pregnant women or women in earlier stages of pregnancy. Such a small percentage of women, probably as small as 10 or 15 percent, suffer any complications during pregnancy as to afford no reasonable basis for a mandatory leave policy applicable to all pregnant women without regard to their actual medical condition.

II. A mandatory leave policy which cannot be supported by any rational grounds violates the equal protection and due process clauses of the Fourteenth Amendment. The right to earn a living at one's accustomed calling is a fundamental right which can be infringed only to serve a compelling state need. No state need is shown here. The holdings of EEOC, state fair employment practice agencies and numerous federal courts that mandatory leave constitutes unlawful sex discrimination should be followed.

III. The school board rule, by compelling a female employee to be absent from work without pay for a

longer period than is medically necessary constitutes an unreasonable impediment to the ability of the female to compete in employment with the male. She loses continuity of tenure while the male retains it. She loses actual experience on the job which the male is getting while she is on leave. She has fewer funds to use for acquiring further education while the male has the opportunity to have his earnings and use them to advance his education, with resulting enhanced teaching status.

ARGUMENT

Introduction

Most, if not all, distinctions in treatment, for purposes of employment, between men and women are based upon either actual or supposed differences arising from women's child-bearing capacity. After all, it is the fact that women bear children and men do not, which creates the classification of the human species into male and female. The whole range of employer practices¹² differentiating between male and female and all the so-called female state "protective"¹³ legislation have historically been justified on grounds leading directly or indirectly to either the potential or actual child-bearing function of women.

¹² E.g., *United Screen and Bolt Co.*, 17 War Lab. Rep. 232, 235 (1944) where an employer after determining by established job evaluation methods the point value of jobs without regard to the sex of the employee had placed a lower wage rate on the job when performed by a female because her potential for absences for childbirth allegedly made her services of less value to the employer.

¹³ *Muller v. Oregon*, 208 U.S. 412, 421 (1908) sustaining the constitutionality of an Oregon statute forbidding employment of females for more than ten hours per day, in which one of the reasons for limiting her to ten hours was described by this Court as "her maternal functions." See *Cheatwood v. South Central Bell Tel. & Tel. Co.*, 303 F. Supp. 754, 759-760, 2 FEP Cases 33.36 (M.D. Ala. 1969) arising under Title VII holding possible pregnancy of some women no basis for denying job to all women.

More specifically, practices based on singling out pregnancy for special treatment have deprived female of their seniority rights and left them with a junior status when applying for a job or promotion. Even the one-tenth of all females who remain single and have a longer work life on the average than male employees, 45 years for females as against 43 for males,¹⁴ have been denied training for, and promotions to, higher paying jobs on the employer assumption that they would not remain in the labor market as permanent employees.

The discrimination against women as workers which followed the combined concern for her as a future mother, with the accompanying employer ability to discount the value of her services because of her alleged transiency in the labor force, brought such a host of ills as to generate the federal and state equal pay and equal protection laws and occasion a new judicial approach.

Without attempting to catalogue the ills flowing from sex discrimination, we call attention to the resulting poverty. The 1970 Report of the President's Task Force on Women's Rights and Responsibilities entitled, "A Matter of Simple Justice," U.S. Government Printing Office 1970, p. 18, stated:

"Sex bias takes a greater economic toll than racial bias. The median earnings of white men employed year-round fulltime is \$7,396, of Negro men \$4,777, of white women \$4,279, of Negro women \$3,194. Women with some college education both white and Negro, earn less than Negro men with 8 years of education.

"Women head 1,723,000 impoverished families, Negro males head 820,000. One-quarter of all

¹⁴ U.S. Department of Labor, Women's Bureau Bulletin No. 294, 1969 Handbook on Women Workers, Government Printing Office 1969, p. 7.

families headed by white women are in poverty. More than half of all headed by Negro women are in poverty. Less than a quarter of those headed by Negro males are in poverty. Seven percent of those headed by white males are in poverty." (footnotes omitted)

In 1972 the median income for white men working year round full time was \$10,918, of Negro men \$7,373, of white women \$6,172, of Negro women \$5,280. U.S. Department of Commerce, Current Population Reports, Consumer Income, Series P-60, No. 87, June 1973. Women headed 2,100,000 unpoverished families. U.S. Department of Labor, Employment Standards, Women's Bureau, Facts About Women Heads of Households and Heads of Families, April 1973 p. 8.

The key role of employer practices with respect to employment of pregnant women has been the subject of a study and report by the Presidentially appointed Citizen's Advisory Council on the Status of Women, Women in 1970, Appendix D, page 20, which stated:

"Childbirth and complications of pregnancy are, for all *job-related purposes*, temporary disabilities and should be treated as such under any health insurance, temporary disability insurance, or sick leave plan of an employer, union or fraternal society. Any policies or practices of an employer or union, written or unwritten, applied to instances of temporary disability other than pregnancy should be applied to incapacity due to pregnancy or childbirth, including policies or practices relating to leave of absence, restoration or recall to duty and seniority.

"No additional or different benefits or restrictions should be applied to disability because of pregnancy or childbirth, and no pregnant woman employee should be in a better position in relation to job-related practices or benefits than an em-

ployee similarly situated suffering from other disability." (Emphasis in original)

Thereafter the EEOC and various state fair employment practice commissions issued guidelines in conformity with the recommendation of the Citizen's Advisory Council above quoted. All those guidelines stated that an employer is guilty of invidious discrimination because of sex if he denies full employment opportunities to a pregnant woman who is medically determined to be able to work. The pertinent provisions of the EEOC's Guidelines on Discrimination Because of Sex, 29 U.S.C. 1604.10, issued March 31, 1972, reads:

"1604.10 *Employment policies relating to pregnancy and Childbirth.*

"(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of Title VII.

"(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, and accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

"(c) Where the termination of an employee who is temporarily disabled is caused by an em-

ployment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity."

The following states have adopted guidelines which similarly bar mandatory unpaid maternity leave: Illinois Sex Discrimination Guidelines, Section X, effective November 3, 1971, CCH-EPG Par. 23,820.08; Maryland Sex Discrimination Guidelines, Section 8, F.E.P. 451:541; Minnesota Sex Discrimination Guidelines, Section 51e, CCH-EPG Par. 21,490.05; Pennsylvania Sex Discrimination Guidelines, as amended December 20, 1971, CCPH-EPG Par. 27,296.02; Washington Sex Discrimination Guidelines, WAC 162-30-020 (5), CCH-EPG 28,574(4); Wisconsin Sex Discrimination Guidelines, adopted July 10, 1972, CCH EPG Par. 29,100(B).

The Office of Federal Contract Compliance acting pursuant to Executive Order No. 11,246, 3 C.F.R. 339, on November 12, 1970, issued the following question and answer to its agency compliance officers:¹⁵

"Q. May a contractor specify the time when maternity leave shall begin?

"A. Not normally. This is primarily a medical decision which is not reasonable for a contractor to make in terms of a blanket policy. The time when a woman leaves before childbearing is normally between the pregnant employee and her doctor."

Prior to adopting its Guidelines the EEOC had consulted Dr. Andre E. Hellegers and utilized his services as an expert witness in proceedings instituted

¹⁵ Memorandum to heads of Agencies from John L. Wilkes, Director, Office of Contract Compliance, Dep't of Labor, Questions and Answers Concerning Sex Discrimination Guidelines, Nov. 12, 1970.

by EEOC before the Federal Communications Commission. A copy of the testimony of Dr. Hellegers before the Federal Communications Commission is attached hereto as Appendix A, pp. 1a-10a, *infra*. Dr. Hellegers testified that there is "no physiological data which would warrant a rule that women in pregnancies should cease working." (p. 1a, *infra*) Before so testifying, Dr. Hellegers had cooperated with EEOC in preparing key words to be placed in the Medlars Computer retrieval system at the National Institute of Health for the purpose of locating and studying all the medical literature relevant to the issue.¹⁶

As we shall show hereinafter, the principle adopted by the Guidelines, with respect to the right of a pregnant employee to continue to work up until delivery unless she is medically determined to have complications which disable her from work, is based on accepted medical practice.

I.

There is no medical basis for a rule which requires a female employee because she has reached a specified month of pregnancy and without regard to her actual physical condition, to cease work at any time prior to the onset of labor.

In neither *La Fleur* (No. 72-777) nor *Cohen* (No. 72-1129) has the school board ever contended that the school teacher plaintiffs, *La Fleur*, *Nelson* and *Cohen*, were in any way physically disabled. Each was admittedly an excellent teacher, and there is not a scintilla of evidence that any of their pregnancies had impaired their performance of their duties or that

¹⁶ Information furnished to counsel for the IUE by David Copus, attorney, EEOC, who worked with Dr. Hellegers in arranging for the Medlars retrieval project at the National Institute of Health.

continued employment would in any way harm any of them or their offspring. Rather the respective school boards rest on their position that the school board's rules are valid. We believe that *La Fleur*, Nelson and Cohen, having been healthy and able bodied, should have been judged as individuals rather than by general rules which operated discriminatorily as applied to them. However, there is not even a medical basis in the record in either the *La Fleur* or the *Cohen* case for a mandatory leave policy. To the contrary, all of the doctors who testified in the *La Fleur* case and the only doctor to testify in the *Cohen* case, the Chesterfield school board not having called any medical witness, testified that they regularly advised patients who had no complications, to work throughout their pregnancies (*Cohen*, pp. 25-28, 71, 75-77; *La Fleur*, pp. 92a, 93c, 128a, 148a-150a, 151a, 156c-157a).

The medical literature fully supports the view that pregnancy per se without complications does not disable an employee from continuing to perform the same job as she was accustomed to performing when she became pregnant. Not only is it medically established that there is no deterioration in a pregnant woman's mental and physical capacity by reason of pregnancy, but several recent studies indicate it is in fact enhanced. Studies of comparative exercise efficiency of pregnant and non-pregnant women showed that pregnant women between the 24th and 35th weeks of pregnancy have a greater exercise efficiency than non-pregnant women or women during the earlier months of pregnancy.

Joseph Seitchik, *Body Composition and Energy Expenditure During Rest and Work in Pregnancy*,

American Journal of Obstetrics and Gynecology, Vol. 57, page 701, March 1, 1967, describes an exercise study of 195 women, divided between 133 pregnant women, 34 non-pregnant women and 28 postpartum women. He used a stationary bicycle ergometer. His conclusions were stated as follows (at p. 709):

"Our pregnant women did not pay a greater price for the performance of this specific quantity of work. They appear to be at least as efficient as nonpregnant women, and are most efficient between 24 and 35 weeks. In retrospect, this result is not surprising. The period of maximum exercise efficiency occurs during that time when the cardiac output and blood volume are reaching their maxima. Pregnancy produces no alterations in the ability to ventilate. Therefore, the cardiovascular and respiratory set of the pregnant woman should not produce any limitation of exercise tolerance."

In a comment accompanying the publication of the article, Dr. Edward C. Hughes of Syracuse states (at p. 710):

"The interesting finding that pregnant women are more efficient in carrying work loads during the twenty-fourth to thirty-fifth weeks of pregnancy brings up several possible explanations. It is possible that between the twenty-fourth and thirty-fifth weeks of pregnancy the body activity is at its maximum efficiency. Certain physiological events seem to point in this direction.

"1. Cardiac output begins to rise at about the tenth week, reaches a peak action between the twenty-fifth and thirtieth weeks, and gradually declining to near normal at term. The maximum reported values average between 30 and 40 percent above the nonpregnant level, the increased

continued employment would in any way harm any of them or their offspring. Rather the respective school boards rest on their position that the school board's rules are valid. We believe that *La Fleur*, Nelson and Cohen, having been healthy and able bodied, should have been judged as individuals rather than by general rules which operated discriminatorily as applied to them. However, there is not even a medical basis in the record in either the *La Fleur* or the *Cohen* case for a mandatory leave policy. To the contrary, all of the doctors who testified in the *La Fleur* case and the only doctor to testify in the *Cohen* case, the Chesterfield school board not having called any medical witness, testified that they regularly advised patients who had no complications, to work throughout their pregnancies (*Cohen*, pp. 25-28, 71, 75-77; *La Fleur*, pp. 92a, 93c, 128a, 148a-150a, 151a, 156c-157a).

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"1. Cardiac output begins to rise at about the tenth week, reaches a peak action between the twenty-fifth and thirtieth weeks, and gradually declining to near normal at term. The maximum reported values average between 30 and 40 percent above the nonpregnant level, the increased

output probably being due to increased cardiac volume.

"2. The blood volume reaches 20 to 30 percent above the normal from the twenty-fifth to thirty-fourth week of pregnancy with increments in both the plasma volume and red cell mass. This is followed by a decline during the last 4 to 6 weeks of pregnancy, although term values still are definitely higher than the normal. The hypothesis that placental function with increased hormone-steroid production may have an effect upon these activities, affecting cardiac output and the general metabolic activity, has been proposed by others."

Michael Bruser, *Sporting Activities During Pregnancy*, Journal of Obstetrics and Gynecology, Vol. 32, p. 72 (November, 1968), summarizes his conclusions respecting this study as follows:

"A recent report of certain exercise tests done in 34 nonpregnant, 133 pregnant, and 28 recently-pregnant women offered the following conclusions:

"1. Pregnancy produces no alteration in the ability to ventilate.

"2. The period of maximum exercise efficiency occurs during the time when cardiac output and blood volume reach their maximums.

"3. Measurements of exercise efficiency show that pregnant women are as efficient as nonpregnant women (except that women who were 24-35 weeks pregnant were even more efficient).

"4. There should be no limitation of exercise on any presently identifiable physiologic grounds until very late in pregnancy, when many of the physiologic alterations of pregnancy, such as cardiac output, revert to nonpregnant levels."

The above cited article on sporting activities contains numerous interesting facts respecting the placement of pregnant women in Olympic sporting events, including the fact that of 26 female Soviet Olympic champions of the XVI Olympiad in Melbourne, ten were pregnant (at p. 723). Bruser also states that (at p. 722):

"In 1961, a report from a German sports school stated that the physicians there had learned to allow all sports during pregnancy except those accompanied by 'bumping and compression.' They also stated that the athlete has a better labor—i.e., easier and with fewer complications."

The illogical character of employer insistence on mandatory leave applicable to the last half rather than the first half of pregnancy is commented upon in William J. Dignam, *Work Limitations of the Pregnant Employee*, *Journal of Occupational Medicine*, Vol. IV., 1962, p. 423 at p. 424:

"Many institutions have an arbitrary policy with respect to how long pregnant women may work, but I doubt that these policies are logical from a medical point of view. In general a woman is no less efficient, and perhaps more so, in late pregnancy than in early pregnancy."

In appendices to this brief we have reprinted excerpts from the testimony of four outstanding obstetricians given in cases in which the issue for decision was whether it was a violation of fair employment practices legislation barring sex discrimination for employers to apply different leave policies to pregnant employees than were applicable to employees with other disabilities.

In one instance the doctor was called originally as a witness by EEOC, namely Dr. Andre E. Hellegers,

Professor of Obstetrics-Gynecology, Georgetown University, excerpts from whose testimony appears in Appendix A, pp. 1a-10a. Dr. Hellegers thereafter appeared as a witness for the complainants in a case pending before the New York State Division of Human Rights and excerpts from his testimony in that case are printed in Appendix C, pp. 13a-17a *infra*.

Dr. John C. Donovan, Chairman of Obstetrics and Gynecology at Strong Memorial Hospital in Rochester, New York appeared in a similar case as a witness called by Stromberg-Carlson Corporation. Excerpts from his testimony are printed in Appendix D, pp. 28a-36a, *infra*.

Dr. George Wilbanks, Chairman of Obstetrics and Gynecology at Rush-Presbyterian St. Lukes Medical Center, Chicago, was deposed as a witness called by General Electric Company and his deposition admitted in evidence in *Gilbert v. GE.*, U.S.D.C.E.D.Va. Civil Action No. 142-72-R. Excerpts from his testimony are printed in Appendix F, pp. 41a-47a, *infra*. The respective curriculum vitae of each of the foregoing doctors is also printed in the appendix (Dr. Hellegers at pp. 11a-12a; Dr. Donovan at pp. 37a-40a; Dr. Wilbanks at pp. 48a-50a).

Finally excerpts from a deposition given by Dr. William C. Keetels, Chairman of Obstetrics and Gynecology, University Hospitals, Iowa City, Iowa, called as a witness by the complainant in a case before the Iowa Civil Rights Commission involving mandatory leave as applied to a school teacher, is printed as Appendix H at pp. 51a-58a. Dr. Donovan identified Dr. Keetels as one of the most prestigious obstetricians in the country (p. 35a, *infra*).

All of the foregoing doctors agreed that there was no physiological data which would warrant a rule that women in pregnancies, who had no complications, should cease work any time prior to the onset of labor (Hellegers, pp. 1a, 4a, 15a, 16a-17a Donovan pp. 30a, 34a; Wilbanks, pp. 41a, 42a, 43a, 47a; Keetels, pp. 52a, 53a, 54a, 57a). Dr. Keetels in his testimony stated that the practice of allowing pregnant women to continue to work till term represents a change in accepted medical views which has occurred within the last four or five years but that the majority of the medical profession today is engaged in regularly advising normal patients that they may continue on their usual jobs until the onset of labor, with more and more doctors shifting continually to this practice (Keetels, p. 58a, *infra*). Dr. Donovan (p. 34a, *infra*) and Dr. Wilbanks (47a, *infra*) expressed their agreement with Dr. Keetels that the majority of doctors had now accepted the view that pregnant women could properly be advised to work until the onset of labor and that the medical profession was engaged in shifting to this view.

Women employed outside the home throughout pregnancy had no greater evidence of complications than those who stayed home (Hellegers, p. 15a, 17a, 18a, *infra*, Keetels, p. 54a). Indeed none of the doctors knew of any instance where working had a detrimental effect on either mother or offspring (Hellegers p. 17a, 18a, *infra* Keetels, p. 54a, *infra*). All four doctors pointed out that the hospitals were full of female doctors, interns and nurses who worked until they went to the delivery room, in many instances during the shift on which they were working (Hellegers, 2a, 8a, 9a, 16a; Donovan 33a, 36a, Wilbanks 42a; Keetels, 54a).

It was pointed out these doctors, interns and nurses continued their full duties throughout pregnancy, including the lifting of patients by nurses (Hellegers, 16a, Donovan, 33a).

Keetels expressed his view that there was nothing about the duties of a teacher which afforded any basis for requiring her to cease teaching at any time prior to delivery (pp. 53a-54a).

These doctors also agreed that it was today accepted medical practice to advise patients to continue throughout pregnancy their usual horseback riding, tennis, swimming, bowling and other sports activities (Wilbanks, p. 43a, *infra*). Dr. Wilbanks mentioned an instance when a pregnant patient's golfing was improved by her pregnancy (p. 43a, *infra*).

Not only did these doctors agree that it was acceptable medical practice today to advise a pregnant patient that there were no medical reasons for her to stop work until the onset of labor unless some complication arose, they agreed that there were often advantages to the continued employment of the pregnant female patient. Dr. Hellegers listed three different deleterious effects one or more of which might result from requiring a woman to cease work during pregnancy: (a) the loss of income might result in a deficient diet which could adversely affect the future offspring; (2) being home taking care of other children is often harder on a woman than her usual paid job; and (3) the psychological stress of doing nothing would be worse than any strain from her job. (Hellegers pp. 1a-20a. Cf. Donovan p. 33a). With respect to the effect of loss of income on the deficient product of the pregnancy Dr. Hellegers (pp. 19a-22a, 25a) pointed to

studies which showed a positive correlation between low income and infant mortality and between low income and smaller weight at birth. U. S. Dept. of Health, Education and Welfare, National Vital Statistics System Series 22, No. 15, Infant Mortality Rates, Relationship to Mothers' Reproductive History, p. 25, Table 16 (GPO April 1973); National Vital Statistics System Series 22, No. 8, Variation in Birth Weight, Legitimate Live Births, p. 23, Table 11 (GPO 1968).

Dr. Hellegers pointed out that the smaller birth weight reflecting a deficient diet indicated prematurity and often imposed a heavy burden on society because such a child was often handicapped by mental retardation, cerebral palsy or other central nervous system defects (pp. 2a, 21a, 23a-24a, 25a, 27a).

During the course of the examination of these witnesses almost every, if not every, suggestion which the attorneys for the Cleveland Board of Education advanced as an alleged medical basis for the school board's mandatory leave policy was rejected.

With respect to frequency of urination the doctors doubted that any great increase took place during pregnancy but even if it did, men voided so much more frequently as to make the increase insignificant. (Hellegers 6a-7a).

During the second and third trimesters miscarriages do not result from falling or fainting or being pushed. Almost 100 per cent of spontaneous miscarriages occur during the first three months, and hence are irrelevant to rules starting leave at the end of the fourth or fifth months (Hellegers, p. 8a Donovan p. 30a; Wilbanks p. 45a).

Morning sickness and nausea are likewise problems of the first three months not relevant to rules requiring leave beginning at the end of the fourth or fifth month or later (Hellegers p. 6a).

Overreaching with the arms can have no effect on the pregnant mother or fetus (Hellegers p. 10a, *infra*).

Lifting of heavy weights can have no effect on the pregnant mother or fetus. Pregnant mothers with older children regularly lift them during pregnancy. They also lift and carry heavy bags of groceries and other lifting involved in housework, without any effect on the outcome of the pregnancy (Hellegers p. 9a-10a; Wilbanks p. 42a *infra*).

Judgment is not affected by pregnancy (Wilbanks p. 43a, *infra*).

IQ is not affected by pregnancy (Wilbanks p. 43a, *infra*).

Coordination is not affected by pregnancy (Wilbanks p. 43a, *infra*).

To the extent that any agility is lost it results solely from weight gain and differs in no respect from the obesity effects which take place in males with overweight problems (Hellegers pp. 5a-6a, 8a-9a; Wilbanks p. 43a). And some women have no weight gain but go through pregnancy so unchanged that those referring to them say, "Gosh I hardly knew she was pregnant. She doesn't show." (Hellegers p. 10a).

The numbers of females who have complications in the second trimester is almost nil (Wilbanks p. 45a). The spontaneous miscarriages, which account for about 10% of the complications of pregnancy occur in the

first trimester (Donovan p. 30a; Wilbanks p. 45a). Thus rules requiring women to leave during the early or middle part of the second trimester are completely irrational.

And with respect to the third trimester, the range of complications which are disabling and arise only from pregnancy was fixed by Dr. Hellegers at 2% to 3% (pp. 22a-23a, *infra*). Dr. Donovan fixed all complications during all trimesters at 15% but testified not all of the 15% would be necessarily disabling (p. 30). Dr. Keetels testified that only 5% to 10% of pregnant women have any complications (p. 52a).

Admittedly a very substantial portion of the complications which are suffered by pregnant women are not due to pregnancy in any sense except that the weight gain brought out a preexisting thyroid, diabetic, liver or heart condition in the same way that a weight gain in a male could aggravate or bring out a previously undisclosed thyroid, diabetes, liver or heart condition (Hellegers 5a, 9a, 15a, 22a-23a; Donovan 31a-32a).

When the realistic facts of pregnancy are accepted, it becomes clear that the possibility 5% or 10% of the teachers may have complications, cannot justify a mandatory leave policy operative at to all teachers irrespective of the wishes or condition of the teacher.

With respect to period of disability following childbirth, all the doctors were agreed on a minimum of 7 to 10 days, an average of two to three weeks, and a maximum of six weeks (Hellegers, pp. 17a, 19a, 26a, 27a; Wilbanks, pp. 44a-45a; Donovan, pp. 33a-34a, 35a, 36a, 42a; Keetels, p. 56a). Here again the periods imposed by the school board rules are arbitrary and capricious, operate to deprive women of needed income and unduly impinge on their private right to have a

child without the imposition by the state of conditions which coerce them not to have children.¹⁷

II.

State action which denies a person of the right to work and continue to be paid her salary solely because she is pregnant, when she is as fully able to perform all the duties of her job as if she were not pregnant, violates the due process and equal protection clauses of the Fourteenth Amendment.

Once it is established that there is no medical basis for a rule requiring a pregnant employee to cease work before delivery simply because of pregnancy per se, it becomes obvious that the rule operates to deprive those to whom it is applied of the right to earn a living at their usual job without any rational justification for doing so. The right to earn a living at any of the "common occupations of life is an inalienable right." *Butcher's v. Crescent City*, 111 U.S. 746 (1884). Although the school boards have leave systems applicable to absences due to other disabilities, in no instance do the rules operate to require a man to be on leave when he is not in fact disabled from performing his duties. Only females are singled out for such treatment. Again since men who become obese and may generate disabling conditions of diabetes, thyroid and heart, are not placed on mandatory leave, whereas women whose pregnancy operates essentially the same as obesity, are forced on unpaid leave, the rule of the school board falls under the principle of *Truax v. Raich*, 239 U.S. 33, 41 (1915).

¹⁷ *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 1038 (1972). In *Gem Electric Co., Inc.*, 11 C.A. 684 (Sidney Wolff, Arbitrator, 1948), it was noted that unless maternity leave was available "the fear that bearing of children would mean loss of their job and all their seniority rights tend to deter them from parenthood."

Cruel hardship to the female and her family often results from forcing on her a period of five, six or more months of unpaid leave just because she is pregnant but at the same time fully able to perform her job and anxious to work for all of that period except from two to six weeks.¹⁸ In its publication "The Myth and the Reality" the Women's Bureau states:¹⁹

"Of the 33 million women in the labor force in March 1972, nearly half were working because of pressing economic need. They were either single, widowed, divorced or separated or had husbands whose incomes were less than \$3,000 a year. Another 5.1 million had husbands with incomes between \$3,000 and \$7,000—incomes which, by and large, did not meet the criteria established by the Bureau of Labor Statistics for even a low standard of living for an urban family of four."

In most states the female employee forced on an unpaid maternity leave is unable to collect unemployment insurance. In 36 states the unemployment insurance laws contain a variety of different kinds of eligibility language disqualifying because of pregnancy and in some cases also for a period after childbirth.²⁰ In three states, Connecticut, Maryland and

¹⁸ Twelve days between December 8, 1970 and December 23, 1970 was the total number of days missed on account of childbirth by Mrs. Danielson, the female school teacher plaintiff in *Danielson v. Board of Higher Education*, 4 F.E.P. Cases 885, 888 (U.S.D.C. S.D.N.Y. 1972).

¹⁹ U.S. Department of Labor, Employment Standards Administration, April 1973.

²⁰ U.S. Department of Labor, Manpower Administration, Unemployment Insurance Service, Comparison of State Unemployment Insurance Laws, Comparison Revision, No. 3, January 7, 1973, Table 407-Availability and Disqualification Provision for Pregnancy, 36 States.

Michigan, the disqualifying language, to the extent that it excluded women who were physically able and available for work, has been held to constitute sex discrimination in violation of the Fourteenth Amendment. *Jordan v. Meskill*, U.S.D.C.D.Conn., Civ. Action No. 15,671, Order of Judge Robert C. Zampani entered June 26, 1973; *Orner v. Board of Appeals, Employment Security Administration*, Superior Court of Baltimore, Case No. 132,572, Harry A. Cole, Judge, July 28, 1972; Michigan Attorney General's Opinion, February 18, 1972, CCH-EPG Par. 5051.

There is no federal temporary disability insurance system applicable to private industry except the Railroad Unemployment Insurance Act, 42 U.S.C. 351, *et seq.*, which as more fully explained hereafter has always defined sickness to include disabilities from pregnancy and childbirth. The latter law is applicable only to railway workers. Except for five states and Puerto Rico, the rest of the states lack any temporary insurance laws. The New Jersey²¹ and Rhode Island²² state disability laws cover pregnancy. The California Unemployment Insurance Code § 2626 exclusion of pregnancy related disabilities from its state disability insurance program has recently been held unconstitutional as sex discrimination violative of the equal protection clause of the Fourteenth Amendment by a three judge district court. *Aiello v. Hansen*, DLR 6-8-72 (No. 111) p. D-1. U.S.D.C.N.D. California May 1973.

Many women who are forced on unpaid maternity leave have no resources and must go on welfare so

²¹ 43 N.J. Stat. Ann. Secs. 25, 39(e). Cf. *Iorio v. Board of Review*, 88 N.J. Super. 141, 211 A.2d 206 (1965).

²² Gen. Laws R.I. Sec. 28-41-8.

that they and their families can survive until their period of enforced leave comes to an end and they can return to work. Of nine complainants who filed complaints against Stromberg-Carlson Corporation, Rochester, New York, N.Y.S.D.H.R. Cases Nos. CS-27069-72, one, Betty Williams, testified under oath and without contradiction at the hearing before the New York State Division of Human Rights on June 6, 1973, that when she was forced on unpaid maternity leave her husband was unemployed because the plant at which he had worked had closed some time before and the whole family had to go on welfare, which also entailed giving up her private physician and substituting, for prenatal care and delivery, welfare medical services. At the trial in *Gilbert v. General Electric Co.*, U.S. D.C.E.D.Va., Case No. 142-72-R, Sherry Osteen, who had been employed at the Portsmouth, Virginia plant of GE, gave undisputed testimony under oath in the federal district court on July 26, 1973, that she had no resources when forced on unpaid pregnancy leave in November 1972 and had to go on welfare, but before her first welfare check arrived her electricity was cut off for failure to pay the bill leaving her and her two year old daughter without light, heat, cooking facilities and refrigeration.

Among IUE's 100,000 female members, more than 400 members have filed charges with the EEOC or state fair employment practice agencies alleging that their employer engaged in sex discrimination by forcing them on unpaid pregnancy leave. At one plant alone, the Warren Ohio plant of General Motors Corp., more than 300 females filed such charges. These are the subject of the class suit, *Grogg v. General Motors Corp.*, U.S.D.C.S.D.N.Y. 73 Civ. 63.

The wide response of both school teacher plaintiffs and industrial workers to the opportunity to file suits and unfair labor practice charges challenging mandatory maternity leave attests to the wide-spread conviction on their part that they are victims of unlawful sex discrimination. Not only have the complaints of the female victims occasioned the numerous court decisions in school teacher cases cited in this brief but have occasioned the inclusion in the Guidelines on Sex Discrimination issued by EEOC (see p. 21, *supra*) and various of the state fair employment practice agencies (see p. 22, *supra*) of prohibitions on forcing leave of absence on females because of pregnancy or childbirth for periods when they are not in any wise disabled.

The EEOC and the state agencies administering laws prohibiting sex discrimination are unanimously agreed that an employer is guilty of discrimination because of sex when he places on maternity leave a female against her will when she is medically determined to be capable of performing all the duties of her job without injury to herself or her future offspring. In addition to the Guidelines on Discrimination Because of Sex issued by EEOC (see p. 21, *supra*) and by Illinois, Maryland, Minnesota, Pennsylvania, Washington and Wisconsin (see p. 22, *supra*), as far as we can ascertain, the other state fair employment practice agencies have followed the same interpretation of sex discrimination in making findings of reasonable cause, instituting court proceedings and filing briefs as *amicus curiae*. The New York State Division of Human Rights filed a brief as *amicus curiae* in *Grogg v. General Motors Corporation*, U.S.D.C.S. D.N.Y. 73 Civ. 63 in support of the IUE's contention

as a plaintiff in that case that requiring an employee to go on pregnancy leave at the end of the seventh month of pregnancy constituted discrimination because of sex in violation of Title VII, stating the position of the Division and citing applicable rulings as follows (Br. p. 3):

"It has been the position of the Amicus in cases brought before it that a mandatory maternity leave policy which fails to consider the physical ability of the individual employee and which treats pregnancy and pregnancy-related disorders differently from any other form of disability deprives that employee of rights protected by the Human Rights Law. Disqualifying a physically capable woman from working because of a condition related solely to her sex is proscribed as a violation of the Human Rights Law. *Allison et al. v. Board of Education, etc.*, Case Nos. CS-21025-70, 20969-70, 20970-70; aff'd by the N.Y. State Human Rights Appeal Board (hereinafter SHRAB) Appeal No. 969, 5/14/72; *Arluck v. East Williston School District, et al.*, Case No. CS-22782-70, aff'd S.H.R.A.B. Appeal No. 1073, 6/14/72; *Plotz-Pierce v. N.Y.C. Board of Education*, Case No. CS-17943-69, aff'd. S.H.R.A.B. Appeal No. 1129, 2/15/73; *Curto v. E. Williston School District*, Case No. CS-25406-71, aff'd. S.H.R.A.B. Appeal No. 1355, 2/8/73; *Weiss v. Wantagh School District #23*, Case No. GCS-26112-72, aff'd. S.H.R.A.B. Appeal No. 1396, 2/15/73."

The Iowa Civil Rights Commission has similarly interpreted the Iowa Civil Rights Act in the case of *Heinen v. Johnston Community School District*, portions of the testimony in which are set forth in Appendix H to this brief, pp. 51a-58a *infra*.

The "great deference", which this Court recognized (*Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971)) should be accorded the guidelines issued by the EEOC, should, we submit, extend to holding that the Fourteenth Amendment has the same reach with respect to sex discrimination by state action.

The determination of Judge Merhige that leave practices applicable to pregnancy and childbirth should be based on the same principles as leave practices in connection with other physical disabilities (326 F.Supp. at 1161) is in accord with the Congressional determination in the Railroad Unemployment Insurance Act, 42 U.S.C. 351(1), that a day of sickness shall include a day during which a woman is disabled by pregnancy or childbirth. When the Railroad Unemployment Insurance Act was amended in 1946 to provide income maintenance for periods of absence due to sickness, Congress treated maternity benefits as a "special form of sickness benefit."²³ The Congressional scheme was to provide unemployment insurance benefits equally for a day an employee was able to work and available for work but could find no work and a day he was unable to work because of sickness. In the 1946 legislation a "day of sickness" was defined as follows (60 Stat. 722, 735):

"§ 351. Definitions.

"(k) * * * (2) a 'day of sickness', with respect to any employee, means a calendar day on which because of any physical, mental, psychological, or nervous injury, sickness, or disease he is not able to work or which is included in a maternity period."

²³ S.Rep. 1710, 79th Con., 2d Sess., U.S. Cong. & Admin. News 1946, 1316, at 1319-1320 (July 12, 1946).

In 1968 the definition of a day of sickness in the Railroad Unemployment Insurance Act was amended²⁴ to its present form which in pertinent part is as follows (45 U.S.C. 351(k)(2)):

“a ‘day of sickness’ with respect to any employee means a calendar day on which because of any physical, mental, psychological, nervous injury, illness, sickness or disease he is not able to work, or, with respect to a female employee, a calendar day on which, because of pregnancy, miscarriage, or the birth of a child, (i) she is unable to work or (ii) working would be injurious to her health.”

The instant cases present only the issue of whether depriving a female of the opportunity to earn a living for an arbitrary period of time during her pregnancy and after she has recovered from childbirth constitutes sex discrimination in violation of the Fourteenth Amendment. It presents no issue as to whether it is also sex discrimination to fail to pay her during periods she is disabled by childbirth or the complications of pregnancy the same sick pay as is provided for all other disabling conditions. However, the Congressional determination in the Railroad Unemployment Insurance Act that a day of sickness includes a day of disablement from pregnancy or childbirth demonstrates that the distinction between a day

²⁴ Act of February 15, 1968, Pub. L. No. 90-257, Title II, § 201, 82 Stat. 23, amending 45 U.S.C. § 351, et seq. See H.Rep. No. 1054, 90th Cong. 2d, 1968 U.S. Code & Admin. News, 1636, 1638, 1670; 114 Cong. Rec. 218 (Senate, January 18, 1968); 114 Cong. Rec. 2182 (Senate July 18, 1968; 114 Cong. Rec. 1043, 1048 (House January 25, 1968). For a record of payments made to women on account of disabilities arising from childbirth and pregnancy see U.S. Dept. of Labor, Women's Bureau Bulletin, 272-1960, Maternity Benefits, pp. 21-24; Railroad Retirement Board, Annual Report 1971, pp. 22-23; Railroad Retirement Board, Annual Report, 1969, pp. 20-23.

an employee who is pregnant can work and the day she is disabled constitutes exactly the same distinction between a day a man can work and a day he is sick. To apply the rule differently to women and assert that because of pregnancy she cannot work even though not disabled is to discriminate because of sex.

Several distinguished arbitrators have ruled that leave and sick pay in connection with pregnancy and childbirth should be handled within the context of the usual rules applicable to leave for medical disabilities in order to avoid sex discrimination. In two cases, school board rules requiring a teacher to go on leave by the end of the fifth month of pregnancy regardless of ability to perform were held discriminatory and invalid. *Middleton Board of Education*, 56 LA 830 (John A. Hogan, Arbitrator, 1971); *Southgate Community School District*, 57 LA 476, 478 (David C. Heilbrun, Arbitrator, 1971).

In private industry the similar holdings of arbitrators date back two decades. *National Lead Co.*, 18 LA 528, 531 (Arthur Lesser, Jr., Arbitrator 1952) holding that the same rules for leave of absence as are applied for other temporary disabilities must be applied in case of disability due to childbirth and indicating the arbitrator believes any other rule would discriminate because of sex; *Republic Steel Corp.*, 37 LA 367 (Joseph Stashower, Arbitrator 1961) holding that continuity of service credit must be granted for period of leave for childbirth as this came within clause providing continuity of service was not broken by illness; *American Machine & Foundry Co.*, 38 LA 1085, 1088 (Wayne T. Geissinger, Arbitrator, 1962) where employees absent for illness do not forfeit vaca-

tion, women absent on maternity leave entitled to vacation; *Washington Publishers Ass'n.*, 39 LA 159, 160 (Judge Nathan Cayton, Arbitrator 1962) holding normal childbirth a sickness for purpose of sick pay.

If the school boards may use the mere fact of pregnancy to disqualify teachers for months before the expected day of childbirth, even though the teachers are adjudged by their doctors able to work, with no contra evidence, there is no logical place to draw the line between the allegedly unique qualities of a female which may be the basis of special rules and those which may not. The only sound line of demarcation is to determine by the evidence whether her unique features have any consequences which justify a special rule. The only consequence of pregnancy or childbirth which would justify denying a female an opportunity to work is her own inability to perform the job with the efficiency usually required or some danger to herself or her unborn child. The matter of danger to herself or her unborn child is a medical judgment. Folklore and mythology cannot properly be substituted for the science of medicine. We make no contention that any employee, whether public or private, should be required to continue any woman on the job before or after childbirth if in fact she cannot perform all her duties equally as well as when not pregnant or if in fact working creates any danger to her or her unborn child. In this connection it may be noted that a survey of employers as to whether any of them had ever had a workmen's compensation claim allegedly due to pregnancy, disclosed that no employer had ever known of a single such claim.²⁵

²⁵ Prentice-Hall, *Personnel Management—Policies and Practices*, Report Bulletin 25, Vol. XIX (1972) pp. 460-461.

We merely urge that where, as here, there is no evidence of inability to perform or danger, it constituted sex discrimination in violation of the Fourteenth Amendment for the defendants to deny the plaintiffs the right to continue to teach and be paid their full salaries.

The courts have agreed that it constitutes sex discrimination in violation of Title VII to bar women from employment merely on the factually unsupported premise that they as a class are less dependable or efficient employees. Instead, an employer must provide such women individually the same opportunity to demonstrate their ability to perform the job as is provided other employees, including similarly situated men. *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (C.A. 7); *Weeks v. Southern Bell Telephone Co.*, 408 F.2d 228, 235-236 (5th Cir. 1969; *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219, 1225 (9th Cir. 1971); *Cheatwood v. South Central Bell Telephone Co.*, 303 F.Supp. 754 (M.D. Ala.). As the Ninth Circuit observed in a hiring context, in *Rosenfeld v. Southern Pacific Company*, 444 F.2d 1219, 1225 (1971), the essence of fair employment is individual rather than class treatment:

"The premise of Title VII * * * is that women are now to be on equal footing with men * * * Equality of footing is established only if employees otherwise entitled to the position, whether male or female, are excluded only upon a showing of individual incapacity * * * This alone accords with the Congressional purpose to eliminate subjective assumptions and traditional stereotyped conceptions regarding the physical ability of women to do particular work." (Citations omitted).

This Court has both in the race (*Carrington v. Rash*, 380 U.S. 89, 96 (1965)) and sex context (*Reed v. Reed*, 404 U.S. 71 (1971)) held that the administrative convenience of applying a general rule that may be true as to many members of the class does not justify its application to anyone as to whom it is not true. Accordingly the imposition of a disqualification from work on the plaintiffs because some pregnant women cannot work constitutes prohibited sex discrimination.

In addition, as the United States Court of Appeals held in *Buckley v. Coyle Public School System*, 476 F.2d 92, 5 FEP Cases 773 (10th Cir. 1973), the school board rule invades the rights of plaintiffs La Fleur, Nelson and Cohen to privacy by requiring them to choose between having their salary for many months that the leave may drag out and having a baby at the price of foregoing pay for the months of enforced leave. We submit that the state here has not demonstrated the sort of compelling interest which justifies this invasion of the plaintiffs' fundamental right to choose to have a baby without having to forego income during months they are fully capable and ready to perform all the duties necessary to earn their salaries.

We submit that the following cases holding that similar school board regulations are invalid as in violation of the Fourteenth Amendment were correctly decided and should be followed by this Court, *Green v. Waterford School Board*, 473 F.2d 629 (2nd Cir. 1973); *Buckley v. Coyle Public School System*, 476 F.2d 92, 5 FEP Cases 773 (10th Cir. 1973); *Bravo v. Board of Education of City of Chicago*, 345 F.Supp. 155 (N.D. Ill. 1972); *Health v. Westerville Board of Education*, 345 F.Supp. 501, 505 (S.D. Ohio 1972); *Williams v.*

San Francisco Unified School District, 340 F.Supp. 438, 443; *Pocklington v. Duvall County School Board*, 345 F.Supp. 163 (N.D. Fla. 1972); *Monell v. Department of Social Services*, 4 FEP D 5936 (S.D. N.Y. 1972); *Garner v. Stephens*, Civil No. 6855 (N.D. Ky. filed December 1, 1972). Compare the similar holding of the Supreme Court of Pennsylvania: *Cerra v. East Stroudsburg Area School District*, 299 A.2d 277, 5 FEP Cases 480 (Pa.SupCt. 1973).

III

The practice of an employer which requires a female employee to be absent from work without pay on account of pregnancy and childbirth for a longer period than is medically necessary constitutes an unreasonable impediment to the ability of the female to compete in employment with males.

The Fourth Circuit placed controlling weight upon its assumption that there is no "possibility of competition between the sexes in this area", 474 F.2d 397. But the imposition of long periods of unpaid leave on a female teacher because she is pregnant does impose an impediment to her ability to compete with male employees. Continuity of tenure in the teaching world is a valuable right. It often provides the standard for promotion to higher paying jobs or establishes the basis for increased pay. For a female in an industrial plant to suffer loss of seniority, either by fixing a new hire date or deducting time off from her total seniority, places her at a competitive disadvantage with males. Males hired on the date of her original employment have a higher seniority date and move on to advanced pay or advanced classifications while she is not eligible to the same advancement because of her reduced seniority.

And looking to experience actually gained on the job, the female placed on leave does not get experience during the period of her leave, while the male employee, never forced out on leave by his male attributes, accrues valued experience.

Similarly the loss of earnings during the period of enforced leave may make it impossible for the female to take courses she planned to take whereas the male can use his earnings to pay for courses leading to advanced degrees and resulting higher status in the teaching profession.

We submit that by any analysis of the effects of the forced unpaid leave on the female, it will be found that she is disadvantaged in a respect in which she and the male teachers are in competition.

CONCLUSION

For the foregoing reasons it is respectfully urged that this Court should affirm the decisions of the Sixth Circuit in the *La Fleur* case (Case No. 72-777) and reverse the decision of the Fourth Circuit in the *Cohen* case with directions to affirm the judgment entered by Judge Merhige in the district court on May 17, 1971.

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July 31, 1973

APPENDIX

APPENDIX

APPENDIX A

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

Docket No. 19143

In the Matter of:

Petitions filed by the
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

Testimony of Andre E. Hellegers

(called as a witness by the Equal Opportunity Commission on February 14, 1972 in hearings which considered among other issues, the leave policies of the American Telephone and Telegraph Co.)

My name is Andre E. Hellegers. I am presently Professor of Obstetrics-Gynecology, Professor of Physiology-Biophysics as well as the Director of Population Research at Georgetown University. In addition I am currently president of the Perinatal Research Society. A listing of my further qualifications can be found in the complete curriculum vitae attached hereto.

There are to my knowledge no physiological data which warrant a rule that women in pregnancies should cease working. It should be recognized that if a woman were to develop diabetes, hypertension, or certain other conditions in pregnancy, then it would be possible that a stoppage of work would become necessary, but this in no way differentiates pregnancy from nonpregnancy, since this statement would be equally true for nonpregnant women, or indeed for men. No medical evidence can be adduced for the need to cease working in pregnancy. Indeed this may be deleterious in some circumstances in which:

1. Loss of income would occur, which might decrease the quality of the diet consumed in pregnancy.

2. A woman has several children, in which case her house work is likely to put more strain on her than a regular job in the labor force.
3. The psychological stress of doing nothing could be worse than that of being gainfully employed.

The Georgetown Obstetrical Service's advice regarding the desirability of working in pregnancy is individualized for every patient as it would be for nonpregnant patients, male or female, who ask whether they are capable of doing a particular job.

It is of some significance that women doctors and nurses, who are working on the obstetrical and other services at the hospital often continue working right up to the day of delivery. This of course would not be so if the medical profession thought that working in pregnancy was contra-indicated.

Finally, in the only large-scale analysis of work in pregnancy, involving close to four million women, women, without incomes had a poorer outcome of pregnancy than women with incomes. The positive correlation between higher social classes and incomes with better pregnancy outcome, and lower social classes and income with worse pregnancy outcome is of course well known.

Knowingly, and in the absence of disease, to remove the opportunity for the income-producing activity from women is therefore to expose women and their unborn children to unnecessary reproductive stresses, unless financial compensation is given.

* * * * *

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Whereupon,

Andre E. Hellegers

was called as a witness and, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Copus:

Q. Would you state your name, please? A. Andre E. Hellegers.

Q. What is your business address? A. 3800 Reservoir Road, Georgetown University Hospital.

Q. What do you do there? A. I am Professor of Obstetrics and Gynecology.

Q. Do you have before you a document entitled 1090 "Testimony of Andre E. Hellegers"? A. I do.

Q. Did you prepare that document or was it prepared under your direction? A. I prepared it.

Q. Do you have any changes or corrections to make at this time? A. No, I don't.

Q. Do you, then, adopt this testimony as your own testimony and is it true and correct to the best of your information, knowledge and belief? A. That is correct.

Mr. Copus: I now offer Dr. Hellegers for Voir Dire and Cross-Examination.

• • • • •

1093 Cross-Examination

By Mr. Levy:

Q. At pages one and two of your testimony, you mention diabetes, hypertension or certain other conditions in pregnancy as making it possible that a work stoppage would become necessary.

Wouldn't such conditions as diabetes and hypertension make it probable if not mandatory to stop work?

1094 A. It would depend on how you would define the diabetes and the hypertension.

There are a lot of non-pregnant men and women with diabetes and hypertension working. That in itself is not a contra-indication to work. If it were, I think a lot of executives would be out of jobs.

Presiding Examiner: How about lawyers.

The Witness: Yes, and doctors.

By Mr. Levy:

Q. Can you identify for us the certain other conditions to which you refer in that sentence? A. Congenital heart disease, heart failure, cancer, any kind of thing that would make anybody stop working.

Let me put it that way.

Presiding Examiner: Are those types that would be aggravated by a pregnancy?

The Witness: No, not necessarily. I am sorry, I did not have in mind a particular aggravation by pregnancy. I had in mind there are obviously pregnant women who should not work as obviously there are men who should not work.

By Mr. Levy:

Q. Dr. Hellegers, at page two, you seem to state categorically that there is no medical evidence for the need to cease working in pregnancy on the one hand and yet, you make reference to the Georgetown Obstetrical Services policy of being individualized for every patient. Are these two statements not inconsistent? A. No, I don't think so. Perhaps I can explain it a little lower down, even.

One has to individualize in every man and in every woman who comes to consult you, whether they should or should not work. What I am trying to say here is there is nothing inherent in the pregnant state that prevents some from working and the individualization simply means I

would say to someone with a massive brain tumor who cannot see straight they might be better off not driving a car.

That is what I meant by individualization.

Q. What are the bases on which the Georgetown Obstetrical Services make an individualized determination whether a patient is capable of doing a job? A. I would say if a patient has hypertension which is out of control, if a person has diabetes which is out of control, and requires administration to a hospital and administration of insulin, then obviously, you would admit her to a hospital. You would do the same thing for a man.

Q. Does pregnancy commonly put stress on such organs as the kidney and the liver? A. No, it doesn't; I think it is more by virtue of weight and not by virtue of pregnancy. It is akin to an obesity situation.

Q. Couldn't continuation at a job involve exposure to toxic substances which would produce no harm to a normal non-pregnant woman prove to be harmful to a pregnant woman? A. It is an interesting question. My answer to that would be factually yes, providing that the exposure be in the first 12 weeks of pregnancy which is namely when the organs are being formed.

The difficulty with obstetrical practice is that we have yet to see patients after the time for the damage of irradiation in chemicals has gone by. It is an embryological problem that arises in the first 12 weeks.

Q. I was asking that question as to harm to the pregnant woman herself rather than the fetus she was carrying. A. I don't think that pregnancy increases the harm which a noxious agent can do to a woman. Let me put it that way.

Q. But you would say that continuation of jobs involving potential exposure to various kinds of radiation or toxic matters or ultra-sound could be potentially harmful to the fetus?

• • • • •

1099 Q. Can't factors associated with normal pregnancy such as increased fluid retention, nausea, swollen ankles, bladder pressure, generally lessen agility because of this 25-pound weight?

Can't some or all of these result in serious diminution in the speed and efficiency required for the performance of certain jobs? A. Let me put it this way: The water retention in pregnancy is amniotic fluid is 1000 CCs which would be two pounds of water sitting there and then by and large something like five pounds of water which is excess retained in pregnancy and excreted afterwards, so we are talking about something like seven pounds of water which is a heck of a sight less than is carried by most obese men.

I cannot ascribe it to pregnancy but I can ascribe seven pounds of water retained in pregnancy. I cannot ascribe any differences than from men who have had nephritis, to beer drinkers, whatever else retains water, or even salt eaters.

If someone has a particular predilection for salt, they are going to stash away a few pounds of water.

1100 Q. What about some of the other factors that I mentioned? Is morning sickness or nausea fairly common or at least not uncommon in the first trimester of pregnancy? A. That is correct, yes.

Q. Could that result in diminution of the efficiency required for the satisfactory performance of certain jobs? A. Yes, I would think it would be in the same ball park as men with ulcers, burping, nausea. Understand me, I am in favor of good health. My testimony was not directed to whether there aren't changes in a woman's body in pregnancy. Obviously there are. My testimony was directed to the question of work.

Q. I am just trying to explore certain parameters of your views.

What about bladder pressure? Is it not uncommon for the developing fetus to impose greater pressure on the bladder than in the normal non-pregnant state? A. Yes,

it does but women, by and large, void less than men. If voiding in frequency and quantity of urine becomes an issue, then people would say men are in more trouble than women because they void more. That is in terms of CCs of urine produced per day is more than women. I cannot ascribe that to a disease.

1101-A Q. If there were a job that required continued attendance at a station for let us say hour-long intervals and a normally pregnant woman could not sustain the bladder pressure for that long. This could interfere, could it not, with the efficiency of that operation? A. Yes, if you have to go to the john, you have to go to the john, man, woman, pregnant woman or anyone else. I must agree.

Q. Again, Doctor, are swelling of the ankles fairly common in pregnancy? A. Yes, it is.

1101 Q. Can that not possibly have an effect on the satisfactory performance of certain jobs which would call for speed of movement, locomotion? A. It is impossible to answer that.

Q. You are using void in a different sense. A. Yes. It is a kind of theoretical statement which asks are our ankles which are four inches in circumference any better than ankles which are six inches in circumference.

It is an impossible question for me to answer. I don't know if any job specification goes to the circumference of ankles except in the chorus line.

Q. At page 2 of your testimony, Doctor, you suggest that it is of some significance that women doctors and nurses at the hospital often continue right up to the day of delivery.

Are not the job requirements and potential hazardous exposures quite different from those of telephone workers than doctors and nurses? A. That is not within my competence to answer. That would mean I know the full telephone business which I do not.

I am saying there is nothing inherently in the pregnant state that eliminates work as a factor and it is best shown

that those who most deal with pregnancy, namely obstetricians, nurses, pediatric interns, continue right up to delivery time.

1107 By Mrs. Baker:

Q. You mentioned in your responses earlier that during the first trimester the danger seemed the greatest. Was that to the child or to both the mother and the child? A. To the child.

Q. I think we are talking perhaps about three different areas of possible danger and harm. One would be to the baby, one would be to the mother and the third one 1108 might be others resulting from the mother's condition.

For instance, a woman who may be operating and might faint, might cause some harm to her fellow workmen. The question is: Would this harm be any greater than if a man fainted on a job?

Is there something particular about pregnancy which means when something happens to the woman it is any worse than if it happens to a non-pregnant human being?

A. Let me answer two ways: For the pregnant woman to faint and fall is to herself apart from the fetus no more dangerous than it is for a man to fall.

Q. To those around her? A. My sort of crazy mind would say would you rather have a 100 pound woman fall on top of you or a 250 pound man?

More to the point would be your third category which is the fetal category and from the falling point of view, if fainting or falling in the first trimester could make you miscarry or something like that, you know we wouldn't have the abortion legislation fights that we have now today because every woman would drop down and abort it.

Unfortunately, or fortunately, one cannot expel a fetus by falling or all legal abortionists would be out of business.

Q. Do you find that all women lose tremendous amounts of dexterity, stamina, during pregnancy, or is this subject

to individual variation? A. It is individual. It depends on the weight gained and it depends on the starting weight.

Let me try to explain this. If a woman is pregnant and weighs 150 pounds to start with, the 20-pound weight gain on her represents obviously much less of a problem than if the 20-pound weight were to start in a girl who weighed 80 pounds.

It is a fraction of weight carried so one can already tend to individualize on that one in very much the same way as sudden weight gain among men.

A 100-pound man who turns obese is affected more than the man who is obese to start with.

Q. Are all pregnant women subject to a tremendous amount of edema? A. No, it is usually that category of women who have what is called toxemia.

Q. Is exercise contraindicated in edema? A. No.

Q. Can a pregnant woman lift, let us say, 20 pounds when pregnant if she is capable of doing so?

Will it harm her or her child if she is lifting 20 pounds four times a day and she keeps lifting 20 pounds four times a day, should she be able to do this through her pregnancy?

It is like lifting a cow, you can never start that way. A. I am bothered by the generality of the question. Lifting 20 pounds of weight is different for the 80-pound woman from the 160-pound woman.

Now let me answer it is contraindicated to lift children anyone can go into any American home where there is a first child and the second child and you see pregnant women lifting children.

Or, you can go to the supermarket and find pregnant women holding onto two pounds. There are pregnant nurses who lift their patients. They are some savvy, of course, about lifting.

Q. Can pregnant women overreach with their arms? Is there anything about pregnancy that would indicate that a woman should not reach right through pregnancy?

A. There is nothing in the pregnancy that tells she could not reach but I remind you again she does carry the weight in front of her and that is an obvious fact.

Nothing can happen to her. She can't have the baby or go into labor.

Q. And that would depend on the women's own feeling to do it every day? Provided they can get up to the desk or whatever, if they are physically capable because of the weight in front of them— A. There is nothing short in the pregnancy other than the physical mass that contraindicated bending, lifting, and so on.

1111 Q. Just because a woman is nine months pregnant, there is tremendous variation on how much incapacitated, if any, they are? A. So many women have babies of which we say, gosh, I hardly knew she was pregnant. She does not show, is the common expression. Others show very clearly.

Q. Would the same thing go for bending or spending a number of hours sitting? A. Sure. Pregnant women do hardly anything but that when they are home, bend, lift—that is the common state of a pregnant woman.

Mrs. Baker: I think that is all.

Presiding Examiner: Do you have anything further, Mr. Copus?

Mr. Copus: No, Mr. Examiner, we have no questions on redirect.

Presiding Examiner: Thank you, Doctor.

You are excused.

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APPENDIX B**Curriculum Vitae—Andre E. Hellegers, M.D.****BORN:**

June 5, 1926, Venlo, the Netherlands.

MARRIED:

Charlotte Frazer Lindsay Sanders, 4 children.

EDUCATION:

Stonyhurst College, England, 1940-1944

Edinburgh University Medical School, 1944-1951

L.R.C.P., L.R.C.S., L.R.F.P.S., 1951

Belgian National Boards, Brussels, M.D., 1952

Diploma of Aviation Medicine, Paris University, 1953.

HOUSE STAFF:

Department of Obstetrics and Gynecology, The Johns Hopkins Hospital, 1953-1956, 1959.

FACULTY APPOINTMENTS:

Intern to Associate Professor, Johns Hopkins University, 1953-67

Josiah Macy Research Fellow in Physiology, Yale University, 1956-57.

Lecturer in Population Dynamics, Johns Hopkins University, 1966-

Professor of Obstetrics-Gynecology, Georgetown University, 1967-

Professor of Physiology-Biophysics, Georgetown University, 1969-

Director of Population Research, Georgetown University, 1971.

OTHER ACTIVITIES:

Member, Josiah Macy Foundation High Altitude Expedition, Peru, 1958.

Senior Research Scholar, The Joseph P. Kennedy, Jr. Memorial Foundation, 1961-67.

Member, Research Advisory Committee, United Cerebral Palsy Foundation, 1964-1970.

Consultant, Office of the Secretary of Health, Education, and Welfare, 1964-65.

Member and Deputy Secretary General, The Papal Commission on Population & Birth Control, 1964-1966.

Member, President Johnson's Committee on Population and Family Planning, 1968.

Technical consultant, Population Reference Bureau, 1970.

Member, Study Section on Human Embryology and Development, NIH, 1967-1971.

Member, National Advisory Child Health and Human Development Council, NIH, 1971.

SOCIETIES:

A.O.A.

Member, American Gynecological Society, 1971.

Honorary Fellow, South Atlantic Association of Obstetricians and Gynecologists, 1971.

Member, The Society for Gynecologic Investigation (President, 1968).

Member, The Perinatal Research Society (President, 1971).

EDITORIAL BOARDS:

Georgetown Medical Bulletin, 1968-

American Journal of Obstetrics & Gynecology, 1963-70.

European Journal of Obstetrics & Gynecology, 1971-

Gynecologic Investigation, 1971-

APPENDIX C

Testimony of Dr. Andre E. Hellegers, M.D.

(Called as a witness for complainants in *Avery v. General Railway Signal Corp.*, N. Y. State Division of Human Rights, Complaint Case Nos. CS 27503-72, CS 26324-72 and *Franklin v. Stromberg Carlson Corp.*, Case Nos. CS 27069-72, CS 27071-72, CS 27068-72; in Rochester, N. Y., on June 8, 1973, which present issues as to whether the following constitute unlawful discrimination because of sex in violation of the New York State Human Rights Act, N. Y. Executive Law, Article 15, Section 296: requiring a pregnant employee to go on unpaid leave during the latter months of pregnancy and remain on unpaid leave following childbirth without regard to ability to work; cancellation of Blue Cross and Blue Shield at time employee goes on leave depriving employee of coverage for prenatal care and delivery unless employee assumes payment of premiums although employer pays all premiums during periods of leave for other disability and covers prenatal and delivery expenses for wives of employees; no income maintenance for absences due to pregnancy-related disabilities or income maintenance for shorter periods than provided for other absences.)

140 ANDRÉ EUGÈNE DESIRÉ JOSEPH HELLEGERS was called as a witness on behalf of the complainants, and having first been duly sworn by the Hearing Examiner, testified as follows:

141 Direct Examination by Miss Weyand

By Miss Weyand:

Q. Is this a Curriculum Vitae that you prepared? A. Yes. I certainly prepared it.

Q. Have there been certain changes since the date you prepared that? A. There have been additions, yes.

Q. Would you state what those are? A. Well, I'm presently the Director of the Joseph and Rose Kennedy
142 Institute for the Study of Human Reproduction and Bio-Ethics at Georgetown University. The others would be minor additions.

Q. What is involved in the studies that you mentioned at the Kennedy Institute? A. The Institute has three divisions. One of which deals with the biology and physiology of reproduction. The second division is a center for population research which deals with the sociology of reproduction and its consequences and the third division deals with ethical problems in modern biology.

Q. Does this research include analysis of difference in perinatal mortality, prematurity, child spacing and all related problems? A. Yes, it does.

Q. Any others that should be mentioned? A. Economic consequences, migration, population growth, illegitimacy.
143 All the social aspects of reproduction.

Q. What are the various biological interests to which your research is directed? A. Well, my laboratory research is directed towards changes in maternal and fetal physiology in the course of pregnancy. My sociological research is overwhelmingly directed towards perinatal mortality, weight of infants, illegitimacy statistics, child spacing versus mortality versus I.Q. of infants. So really the quality of human reproduction as it relates to quantity, and in its own right.

Q. Apart from the academic research position which you have mentioned, are you also a practicing gynecologist and obstetrician? A. I do absolutely no gynecology that deals with non-pregnant women. In terms of obstetrics I only see patients I'm asked to see by consultation so they're abnormal cases.

144 Q. Has it been your experience that patients who continue to be gainfully employed on a full time job outside the home have a greater incidence of complications during pregnancy than women who stay home? A. No, it has not been my experience.

145 Q. Have you had occasion to advise pregnant patients with respect to whether they should continue their employment during pregnancy? A. Yes. I would say almost every employed woman asks the question.

Q. What advice do you give such pregnant patients? A. We individualize it. As a general principle one would follow that they may continue to work unless there is a contra indication.

Q. Is there, to your knowledge, any physiological data which warrants a rule that at any given stage of pregnancy the pregnant woman should cease work? A. During delivery I would say.

Q. Aside from that? A. I think if you would in labor.

Q. In addition to those who are in labor, is there any physiological data? A. I think up to labor, if no other complications set it, one would advise that the wo-

146 man could continue, given common sense. You wouldn't want a woman pilot to continue flying a plane until the day prior to delivery. One follows common sense.

Q. Is a pregnant woman more susceptible or less susceptible to disease during her pregnancy than when she was not pregnant? A. There are certain diseases which are aggravated in the state of pregnancy mainly as a result of the weight increase that occurs in pregnancy. Classical examples would be diabetes I'd say. Thyroid disease might be. Then there would be certain conditions which might exist in the non-pregnant state which would be aggravated like an aneurysm or a ballooning of an artery that might be aggravated by virtue of rapid weight gain and change of pressure. So they would be essentially aggravations due to rapid weight gain.

Q. Can any medical evidence be educed for the need to cease work because of pregnancy? A. Because of pregnancy per se?

147 Q. Yes. A. None that I know of.

Q. Are there circumstances in which it may be deleterious for a pregnant woman to cease work? A. In which it would be deleterious for her to cease work?

Q. Yes. A. That would depend on her family situation. I think the average woman in pregnancy would much rather work than take care of several children at home. I think the average woman, if she was short of money, would much rather have the money than to cease work. So in that case one would have to say it would depend from case to case what woman one was dealing with.

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148 Q. Have you had experience with pregnant females who did not take leave prior to going into labor? A. Yes. It's virtually universal in obstetrical services, obstetrical nurses, pediatricians, women pediatricians, those would be the ones that on an obstetrical service you would see. I don't know what happens in internal medicine, but in OB GYN, pediatrics, you see persons working right there.

Q. Is there any reason to believe that these female doctors, interns and nurses are continuing to work
149 in opposition to what would be the best medical advice? A. It is a question of don't do as I say, but as I do. They themselves—

Q. Are they continuing to work in conformity with their own notions of what is good professional medicine as far as you understand? A. Yes. I think they do this because they see no harm in it. They want the income. I would expect if their obstetricians said now you have to stop they would then stop.

Q. Their own judgment as to the right to work is in conformity with established medical opinion? A. Yes. I think in modern practice one wouldn't tell a woman to

stop working unless there was a medical indication to stop working.

Q. Based on your experience, how many weeks after childbirth do you usually certify a patient as capable of going back to her job? A. Well, I don't really
150 certify them because as I said, I'm only called in on consultant basis, but the conventional, old fashioned system would be six weeks. The modern system would individualize it depending on the need of the person both for the job, for the money that she'd have, for the job that she would be in and at that point I would say two weeks would be perfectly adequate.

Q. Do you have any idea what the average period is? A. I don't know. I haven't seen any study that average it, I think the only study that might be relevant is that there is increasing evidence that the recurrence of the return to normal in terms of some parameters that you can measure is now occurring earlier. That is to say ovulation occurs earlier, menstruation occurs earlier after childbirth than it used to do say forty years ago.

Q. Not merely a matter of medical practice,
151 but a change in what is physiologically occurring in women; is that correct? A. It is part that and it is part, oh, how should I put it, a changed ethos of reproduction. In old days I suppose women were put in cotton and kept in bed and grandmothers flew in and aunts flew in to help and women were thought to be very delicate creatures. But in relation to production and with increasing numbers of women in the work force, it has become obvious this is a rather silly way of looking at things.

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152 Q. Do you know of any instance where you determined that her working had had a detrimental effect? A. No, not in a cause and effect relationship.

Q. Do you know of any record of other doctors having recorded that working had had a detrimental effect? A.

Oh, I'm sure that doctors have said so and I am sure there would be some who would ascribe it to the phase of the moon or to an astrological chart or whatever one likes, but I don't think there's any evidence
 153 that I can think of which showed a cause and effect link between the work done and the outcome except as I said in terms of detrimental effects on the fetus in the first thirteen weeks of pregnancy.

Q. And those can occur in other instances than radiology. Are there other instances where there is injury during the first thirteen weeks? A. I would think there might be chemical fumes. I would think I wouldn't want to see somebody working in an environment of carbon dioxide, but that would be a general species of do not be around poisonous substances during the developmental stages of a fetus.

Q. That is just the first trimester? A. That's correct.

Q. And aside from chemical and radiological instances you think of no other instances? A. I can't think of any offhand.

Q. Does normal child— A. Might I qualify that?
 154 I'm excluding, constantly, common sensical thing.

If you are a professional parachutist you don't go jumping out of airplanes at nine months of pregnancy. There's an element of common sense here.

Q. Does a normal childbirth in and of itself always disable the new mother for a number of hours or days? A. Yes, I would say women are disabled during the delivery and shortly thereafter.

Q. How long on the average is the period following childbirth that the new mother is disabled from carrying on her customary duties? A. I think that's largely culturally determined. I expect in Africa they start off in the bush taking after existing children right away. In the United States we keep them in the hospital three days nowadays. What happens to women when they go back home and have no grandmother around? I certainly

know a lot of them who have started their household work again from the time they came home. Depends
155 pretty much on what their husbands do.

Q. Is there any indication that this is deleterious, that they should start their housework soon as they come out of the hospital? A. I know of no studies that would show that. The conventional attitude still is that any woman who has just delivered a child is entitled to a rest and it's probably the only excuse most of their husbands give them for ever resting. I think it's more mythology and cultural practice than it's proven biological disability.

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166 Miss Weyand: I would like to have marked as
Complainants' Exhibit number 16 for identification
a pamphlet entitled "Infant Mortality Rates, Relationship with Mothers Reproductive History" published by the United States Department of Health,
167 Education and Welfare, Vital and Health Statistics data from National Vital Statistics System Series 22 Number 15 Issued by the Government Printing Office April 1973.

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By Miss Weyand:

Q. Have you had occasions to talk to one of the individuals who have prepared this or participated in the preparation of this study? A. Yes. This is Mary Grace Kovar.

Q. And do you know the circumstances of this
168 study? A. Yes. It is something that the NCHS which is the National Center for Health Statistics does intermittently which is to take a cross sample of the population and then determine a number of parameters that effect outcome of pregnancy and this was one of those. They've been doing this for quite a while.

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Q. Yes. Turning to Table 17 on Page 25, this table shows what? A. It is a table that deals with what infant death relates to, in terms of income of the mother involved. I shouldn't say the mother involved, but 169 the parents involved, family income.

Q. And is this one of the criteria which has been used in social economic studies to determine the effects of conditions existing prior to birth? A. Well, what it states is what we've known for a long time which is that the lower the income of an individual the higher the infant death rate and the higher the income the lower the infant death rate. I'd add this is stated in this table in terms of family income, but one can do it against education of the parents or against a series of parameters that deal with socio-economic development. One could factually do this internationally by testing less developed countries against more developed countries and so forth.

Q. In addition to infant death, what other measures are used on the success of the prenatal care in terms of what happens to the infant or what kind of an infant is produced? A. Well, one of the problems of doing 170 it against infant death alone is that the major cause of infant death is prematurity. When one has prematurity the question always is whether it is a pregnancy that ended too soon or whether it is a pregnancy that ended at the normal time, but produced too small a baby. So the second test that one would apply would be not just the infant death rate, but one would apply an indicator that would be the weight of the infant produced by a given week of pregnancy.

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178 Miss Weyand: I would like to have marked as Complainants' Exhibit 17 for identification another issue in this same series. This issue is entitled "Variations in Birth Weight, Legitimate Live Births" and it's number 8 in series number 22.
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By Miss Weyand:

Q. Dr. Hellegers, will you look at table 11 on Page 23 and tell me whether this is a table that reflects a study which eliminates the problem of prematurity which you stated affected some of these studies in this regard? A. Yes. This is a table which instead of showing the outcome of the pregnancy by mortality tested against the income of the mother shows the outcome in terms of the weight of the infant produced as against the income of the mother. It is in a sense no different than the other one in that both show the outcome in the infant as a reflection of the state of the mother.

180 So it is the state of the mother affected by the lack of the income, producing in the one case infants that have a bigger chance of dying and in the other circumstance infants having a bigger chance of being small.

Q. Now, could you state in terms of the medical evaluation of the health of a child what weight has to do with it? A. Well, that's very difficult thing to do. Let's put it this way; the greater the degree of prematurity by either duration of pregnancy or by weight of the infant the greater the chance of a handicapping condition existing in the infant. Meaning by handicapping condition mental retardation, cerebral palsy, central nervous system defects. I want to point out that incidence of cerebral palsy or mental retardation would not increase if an infant's weight instead of being thirty five hundred grams were thirty three hundred grams. The lower one

181 gets on the weight scale the more important it is to have the extra hundred or two hundred or three hundred or four hundred grams, however many you can get in there. So it's not correct to place an absolute correlation between all greater weights and all lesser weights in terms of the chance of a given child being handicapped, but as a class the smaller the children are the greater the chances of the after effects of prematurity, mainly retardation and so forth.

Q. Now, these two studies, tables which we have directed our attention to, indicate a positive correlation between one instance death and low income and the other one small weight and low income. A. That's correct.

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184 Q. Thank you. Is there available, as far as you know, any reliable data as to length of time females on the average are disabled by normal pregnancy and childbirth? A. No, not that I know of and I would have to add increasingly less so for the simple reason that we used to follow a mythological practice that stemmed from an age in which, as I tried to say earlier, women in child bearing were put on a pedestal and everybody bowed down to it. All that one can say

is that one sees increasingly the practice of working longer and longer in pregnancy and returning to work earlier and earlier. It's in my opinion a reflection of the fact that women are taken into the work force and are given an opportunity to earn and like to earn whereas if one couldn't earn by going to work one might as well stay on one's back and enjoy it.

Q. Is there any reliable data available as far as you are aware of the percentage of women who have entirely normal pregnancies and childbirth as compared to those who have complications?

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186 A. We commonly say that about ten percent of pregnancies would have some complications that we would be worried about. So one would say ninety percent no problem. Ten percent a problem.

Q. Now, these ten percent that have a problem is there any way of indicating how many of those are problems which would have arisen apart from pregnancy as distinguished from those that arise from the pregnant condition? A. Yes. Let me answer in two parts. One would be disabling conditions which could not occur in the non-pregnant state or in men and those I mentioned earlier

as complications due to the presence of a placenta or presence of a fetus. I would guess I could look it up.

My guess would be that that would be two to three
187 percent. That's off the top of my head. I don't
want to be held to that in a scientific manner.

There there would be complications in which the pregnant state, by virtue of its weight gain situation aggravated or brought out an underlying disease which was already present in the non-pregnant state like thyroid disease, incipient hypertension, incipient diabetes and so forth. In my own thinking I don't think of those as complications of pregnancy. They are conditions present in people brought out by the process of rapid weight gain and I couldn't put a figure on that, actually. There would then be a remaining fraction which would represent precautionary measures taken by a physician as a result of something in which he does not know whether it factually is a meaningful disease or not, and that might be such a thing as an episode of bleeding. It might be an episode of loss of water in which he thought that the

membranes might have ruptured, but factually the
188 woman was voiding and, again, I don't know
whether one wants to call that a disease or doctor
misdiagnosis, but I think the fairly standard figure would be given that we figure approximately ten percent of all pregnant women to have a complication demanding a physician's examination, diagnosis, prognosis and advice.

Q. Would you know of any reliable data that would indicate how many days out of a nine month pregnancy these type of conditions, ten percent have, would disable? A. No, I don't.— — —

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200 Q. Can you state from a medical point of view the consequences of removal from a pregnant woman of the opportunity for income producing abilities without substituting financial compensation? A. Yes. I think it depends on her income scale. I doubt that the

wife of Senator Kennedy would be markedly affected.

If the loss of that income puts one in a family income category which takes one into a health situation that is clearly shown to produce worse infant outcome, smaller infants and so forth, death and smaller weight. This is a sign that that woman is indeed less healthy than if she has been able to have the nutrition or whatever it is that is derived from income. So to the extent in terms of any health parameters that we know of, it is always better to have income than not to have income. I think that's a fairly universal finding including in terms of the type of medical care one can get. It's always better to have a private practitioner at one's call than to have to go to a neighborhood health clinic and wait around for hours and hours and so forth. The quality of the medical care one can obtain is I think a function of income in the United States.

Q. Does the knowing removal from a pregnant woman in the absence of disease of the opportunity for income producing activity without substituting financial compensation expose not only the woman but their unborn children to unnecessary reproductive stresses? A. Yes, indeed it does.

Q. Would you list those stresses, the types of stresses that would— A. I would say the major one is the inability to—I'm not talking about Senator Kennedy's wife now. Wives of millionaires are well off. Whatever happens I would say it comes from the inability to buy the proper nutrition. Secondly, the inability to receive private and experienced care. That is to say that kind of care that comes with a physician having spent many years in practice rather than being attended to by a medical student or somebody of lesser experience. It can be extremely frustrating to have to be at home when one wants to work and it is psychologically not something physicians advise women to do, to stay home. Just simply because of the frustration and their ability to work.

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By Miss Weyand:

Q. As Director of the Kennedy Institute is your expertise limited to the medical field? A. Well, our institute does a lot of studies on the social consequences in terms of deficient outcome of pregnancy as it affects national economics and so on. That is not only our institute; that has been pointed out repeatedly in front of the Senate by physicians, by sociologist and others. Morbidity, cerebral palsy, mental retardation, these things are enormously expensive to the country on a whole in terms of the upkeep of the deficient product of a deficient pregnancy.

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Q. You get into sex discrimination in your studies too?

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A. Well, I think there's considerable evidence that the presence of women in the work force has a fertility depressing effect. These are always studies that show a statistical association between women able to enter the work force and the number of children which they have. It was the basis of President Nixon's Commission on Population and America's Future's recommendation that child care facilities be made available to permit women to stay in the work force. There

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are considerable data that women allowed to go further in the educational process are factually likely to marry later and therefore reach not only possibly a smaller family size, but make the gap between one generation of mother and the next generation of mother larger, which in itself has an effect in slowing population growth. So, yes, there are social consequences in the reproductive field that comes from social practice affecting women.

Q. You have made a study of those, have you? Been part of your institute work? A. Yes.

210 Cross Examination By Mr. Searle

By Mr. Searle:

217 Q. Now, you have indicated in your testimony that for a woman who has had a normal pregnancy and a normal delivery that they might return to employment or other normal functions within two weeks after delivery this might be possible? A. Yes.

Q. That you made the comment that they are returning, that is their body is returning to normal earlier than it used to? A. That's correct. That's to say women recover menstrual function and ovulation sooner nowadays than they did in the past and the higher the socio economic group, the sooner they will recover it.

218 Q. You used the example of a technician in a radiological laboratory? A. Yes.

Q. Is the danger there to the mother or to the fetus? A. It would be to the fetus.

Q. Is there a difference between the two we can talk about the two medically separately? A.

Yes. Let's put it this way: Any male or any female who works in a radiological department one would take precautions that they would protect their gonads from radiation. Now I suppose that one could say is the fact that your gonads are damaged by radiation whether it be male or female, does that mean you now have a disease?

The difficulty now becomes do you believe that their possible production of abnormal children should be considered as a disease in them.

Q. And do you think it is? A. I wouldn't know how to define that. One could very well say it's only the child that is abnormal. My own view would be to say that the constant production of an abnormal child is an indication of a diseased state in the parent, be it a genetic disease, a disease of malnutrition, a disease of irradiation damage and that is precisely why I said earlier in the day that the production of children with excessive death and of children who are too small for their weight reflects the state of the mother and says that she, by having lost her income, is not up to snuff because I think part and parcel of the normal process of life is that if one is in a bodily state that is up to snuff one produces normal children.

222 Q. You describe in your direct testimony that generally it is a three day stay in the hospital for normal delivery? A. By and large nowadays, yes.

Q. And I think you made reference to the fact that many women who left the hospital would then start to do housework and things of that nature around the home? A. Yes, depending on the cooperation of husband, mother-in-laws and other things.

Q. In some of the testimony of the individual complainants there was reference made to not climbing stairs and medically speaking is there a restriction placed on a female upon leaving the hospital and we're assuming a normal pregnancy and a normal delivery, medically is there any restriction on their capability or ability of being able to climb a flight of stairs? A. You mean something like four days postpartum?

223 Q. Yes. A. Not really, no. It's frequently said in the same mythology as do not walk under ladders, do not let a black cat cross and things of that nature. It's not fundamentally a problem.

APPENDIX D

Testimony of Dr. John C. Donovan, M.D.

(Called as a witness for the Respondents before the N.Y. State Division of Human Rights in *Franklin v. Stromberg Carlson Corp.*, Case No. CS-27069-72 and *Avery v. General Railway Signal Corp.*, Case No. CS-27503-72, in Rochester, N. Y., on April 18, 1973, cases presenting issues described at the beginning of Appendix C, p. 13a, *supra*.)

92 DR. JOHN C. DONOVAN, a witness, was called to testify on behalf of the respondents and having first been duly sworn by the Hearing Examiner, testified as follows:

93 Direct Examination by Mr. Ulterino

By Mr. Ulterino:

Q. Dr. Donovan, are you duly licensed to practice your profession in the State of New York? A. Yes, I am.

Q. Do you specialize, Doctor? A. Yes, obstetrics-gynecology.

By Mr. Ulterino:

Q. To bring us up to date, according to your Curriculum Vitae you are connected with Strong Memorial Hospital. Would you tell us what your current appointment is at Strong Memorial Hospital? A. My current appointment at Strong Memorial Hospital is Obstetrician-Gynecologist. Currently I'm acting chairman of Obstetrics-Gynecology and chief obstetrician-gynecologist.

Q. Are you also on the faculty of the University of Rochester School of Medicine? A. Yes, I am.

96 Q. And what is your position there? A. Professor of Obstetrics-Gynecology and Acting Chairman of the Department of Obstetrics-Gynecology.

Q. How many patients do you see a year? A. I will see perhaps fifty private obstetrical patients a year. These are patients whom I would see from the very early sign of pregnancy and personally provide care for them throughout pregnancy, labor, delivery and puerperium. Clinic patients we would see perhaps two thousand a year. These will be patients for whose care I would share responsibility together with other members of the faculty, but I may not personally render that care.

Q. How many clinical patients do you see a year, did you say?

* * * * *

A. Approximately two thousand a year, obstetrics patients.

* * * * *

102 Q. Doctor, in your opinion, is pregnancy a disease, illness or sickness? A. No, sir, certainly not.

Q. How would you classify pregnancy? A. Pregnancy per se is a normal physiologic event.

Q. You mentioned earlier, Doctor, that in defining sickness as sickness being connected with the reserve of an individual being able to cope with stimuli, in normal pregnancies or in most cases, would the reserves of a woman be sufficient to cope with this normal, what you call this normal physiological process of pregnancy?

103 A. Yes. Like any other physiological process pregnancy makes certain demands upon the physical reserves of the woman. In the case of the medically normal woman these normal reserves are more than able to cope with the requirements of the pregnancy.

* * * * *

107 Q. Doctor, in describing pregnancy you have used the word normal pregnancy. What percent-

108 age of pregnancies, excluding inevitable spontaneous abortions could you reasonably estimate are normal pregnancies? A. Of course, in lecturing the

medical students we go over the statistics for this quite a bit. I can answer that pretty much off the top of my head. When you exclude inevitable spontaneous abortions in effect you're asking me what percentage of pregnancies that are destined to reach the point where the baby is theoretically living, if born could be expected to be normal. The figure there would be eighty to eighty five percent excluding spontaneous abortions, could be expected to be normal throughout.

Q. Just to be sure that the record is clear, when we used the term inevitable spontaneous abortion— A. We're talking about spontaneous evacuation, spontaneous I mean as the result of the force within the woman's own body, muscular contractions of the uterus, the evacuation of pregnancies in what are generally referred to as
 109 miscarriages or, medically, abortions. When this occurs almost inevitably close to a hundred percent of instances it occurs prior to the twelfth week of pregnancy and is generally regarded as being due to some major abnormality within the pregnancy that existed almost from the moment of conception, genetic or perhaps due to an abnormal implantation of the fertilized egg abnormally in the woman's uterus. Indeed in many cases of spontaneous abortions the products that are passed will reveal there is no fetus present at all that has developed will be viewed as the afterbirth or placenta nine months later if it went that far.

Q. Doctor, in the case of a normal pregnancy may a woman continue her employment? A. Certainly. Let me hedge a moment on that. It would depend to some extent upon the type of employment. I have read about women now working for the telephone company as line-men. I don't think that a pregnancy, that a woman who is pregnant near term could climb telephone poles.
 110 I interpret your question to mean could a woman continue normal day to day activities including work.

* * * * *

Q. Doctor, we've referred to normal pregnancies and those pregnancies being eighty to eighty five percent of all pregnancies. Now, what would you—how would you describe an abnormal pregnancy and what makes a pregnancy abnormal? A. I think abnormal pregnancies divide themselves into two broad groups. One group would be those pregnancies which per se may be normal, but have occurred in a woman with pre-existing or concurrent medical disease. In which the medical disease has already limited her reserves. Examples would be certain instances of patients with heart disease, kidney disease, certain instances of women who have diabetes. There the reserves have already been lowered by the disease process and in certain cases the added requirements of pregnancy to which I previously eluded may superimpose a load that would be beyond her lowered reserve and the pregnancy, viewing the total body unit of pregnancy in woman, would be viewed as abnormal. The other broad classification would be those instances in which the pregnancy develops some abnormality that is peculiar to and localized to the pregnant state.

Q. Would you elaborate on these abnormalities which are peculiar to the pregnant state? A. Yes. One of the more common that we encounter is so called toxemia of pregnancy which is the metabolic abnormality characterized by elevation of the blood pressure, albumen in the urine and collection of fluid in the tissues. Another example would be placenta praevia in which the placenta has implanted very low in the uterus and may cause life threatening hemorrhage late in pregnancy. These would be examples of complications peculiar to the pregnant state.

Q. Going back, for a moment, to the woman who has a pre-existing condition or disease and who becomes pregnant. Now, in all cases would her pregnancy be classified as abnormal? A. Not at all. Well, pregnancy per se would not be abnormal. The pregnancy existing in this particular

woman, the total unit, the patient, looking at the total unit the situation might—would be abnormal. That does not mean to imply necessarily that all such cases would be disabled.

Q. Again, is it a question of her reserves? A. Question of reserves. To cite an example, some patients with diabetes, the diabetes may be very mild. The pregnancy may be normal. The woman is not disabled. Another patient may have severe diabetes although she may be able
113 to function in a day to day activity the severe diabetes would have severely lowered her reserves and then when pregnancy is superimposed she may become disabled. Whether the patient is disabled, clinically sick, if you will, more sick as a result of pregnancy is really function of reserves and that in turn is a reflection of the individual doctor.

Q. Doctor, would a patient whose pregnancy has some inherent abnormality necessarily be disabled? You may have already touched on that. A. No, very definitely not. Indeed some patients with medical illness are actually improved with pregnancy.

Q. What about the situation of bleeding during the course of pregnancy? A. Well, here bleeding is a symptom, if it's something the woman has noted herself. By definition I suppose it would be a sign of something the doctor observes. What was your question again?

Q. Would that necessarily be a severe complication of pregnancy? A. Not at all. In early pregnancy it would be—whether it would be a severe complication or disabling would reflect very largely on the amount of bleed. If the patient was bleeding enough so that her blood loss exceeded the capacity of her body to reproduce blood then she would sustain an acute anemia and most certainly be disabled. If she were just spotting in no way would she be disabled. The reason I draw that differentiation is because later in pregnancy we are getting into a symptom that may be due to much a whole different series of causes and spotting or mild degree of bleeding in
114

late pregnancy while the symptom would not be disabling, the potential disease or potential abnormality would be potentially disabling to the patient until the doctor had excluded or included these various disease entities. Did I make that too complicated?

Q. That's fine. Maybe we can clarify it a bit
115 more with this question: While fifteen percent, approximately fifteen percent of pregnancies are not normal, not all of those pregnancies that constitute that fifteen percent of abnormal pregnancies are necessarily disabling; is that correct? A. Not at all. That's correct.

Q. Again, this is a tie into her reserves and a function of her reserve to cope with the pregnancy? A. Yes.

Q. Does it have anything to do with the work that she was performing as to whether or not she was disabled? A. Yes. I think I indicated that earlier when I eluded semi facetiously to climbing a telephone pole. I think on the face, validity, a woman with a term abdomen would have to give up her activity if she were a professional athlete on a swim team. This does not have to do with normal day to day activities.

Q. But in terms of normal day to day activities and under normal circumstances a woman could continue
116 to work? A. Yes. Every hospital is full of pregnant nurses and pregnant obstetricians who are working up to the actual onset of labor, doing their normal activities. If there's anything harmful about this such phenomenon would not exist.

Q. Anything beneficial in continuing to work? A. Yes, it is. The general medical feeling, if the patient is medically normal and the pregnancy is normal she should be indeed encouraged to continue her usual activities.

* * * * *
117 Q. Is a woman who has delivered a child disabled during the entire puerperium? A. Not at all.

Q. Of what period of time is a new mother clinically or medically disabled? A. In certain instances would not be

disabled strictly speaking a few hours after delivery of the baby. However, to respond to your question in a conservative way I would say a period of ten to twelve, maybe fourteen days they may be either disabled or at least at risk.

Q. At the end of this period of seven to ten days or as high as fourteen is a woman medically and clinically
118 able to return to work? A. Yes. I interpret your question to mean a normal woman with a normal pregnancy and normal delivery.

• • • • •

121 Q. Excuse me one minute, Doctor. One last question. This testimony that you have given today, is
122 this just your own personal opinion or is this generally accepted medical opinion? A. I think I can say quite authoritatively that it is generally accepted medical opinion.

• • • • •

Cross Examination by Miss Weyand

By Miss Weyand:

Q. Has there been a very radical change in the medical profession towards the length of time during which a woman may continue at her normal activities in the last thirty years? A. Very definitely.

Q. And it is a continuing shift; is that correct? Have the doctors all agreed with you that women now can continue their normal activities up until they go into delivery?
A. I think there is a continuing shift, a further relaxation of the restrictions in the last five years. I think there are many—there are some physicians, I won't say many,
123 who would be more restrictive still and I would predict in the next few years the number of such physicians will further decrease. To answer your question I think the word "continuing" is correct.

Q. I'd like to read you a—I'm going to offer this ex-

hibit. I'll give it to you. Portion of testimony by Dr. William C. Keettels who is— A. Professor at Iowa.

Q. Head of the department, and I understand that he is one of the most prestigious of the obstetricians in this country; is that correct? A. I would agree.

Q. He was testifying in a case involving one of the issues here, the issue only of mandatory leave of a pregnant woman and what I wanted to direct your attention to was his testimony, the question, I'm starting on Page 18, the bottom part of the page (reading) "Is it still an acceptable standard also that a pregnant woman should leave her employment anywhere from four to six weeks prior to the time of delivery to become acclimated to the home
124 and acclimated to the time of delivery and such? Answer, I think no. I don't think that is necessary.

• • • • •
125 Well, I think the medical profession is really swung
126 around to the fact, the knowledge that a pregnant woman can work right up to term and not have any—
accrue any disadvantage so that ten years I think that six months would have been common practice, but today it wouldn't be. Question, Would seven months? Answer, Well, it's the same. Question, Eight months? Answer, The same way."

Would you agree that the majority of practice now has swung around so they can work up to the delivery? A. That sounded very much like Dr. Keettels.

Q. You agree he's stating the medical practice as you understand it? A. As I understand what you have read, the answer is yes.

• • • • •
130 Q. If a female desires to work and you find that after seven days after delivery that she is not in your opinion medically disabled do you certify her as able to work? A. Yes.

• • • • •

131 Q. You have doctors and nurses that return within seven to ten days? A. Yes.

Q. And there's no medical indication that that is not completely healthy, I take it? You and the people around them know better than anybody else what's healthy? A. Seven to ten days perhaps the upper limit of normal and what we're talking about now, fourteen days.

• • • • •

APPENDIX E**Curriculum Vitae**

John C. Donovan, M.D.

Home Address: 54 Sunset Boulevard, Pittsford, New York

Office Address: 260 Crittenden Boulevard, Rochester, New York

Birth: November 15, 1919; Scranton, Pennsylvania

Social Security Number: 105-14-8501

Marital Status: Married, Margaret Wood, R.N.; 1947
Two children; daughter, born 1954; son, born 1958

Preliminary Education: Public School System, Binghamton, New York

College: University of Notre Dame, 1938-1941; B.S. awarded 1954

Medical School: University of Rochester School of Medicine and Dentistry, 1941-1943, 1944-1945; M.D. 1945

Board Certification: American Board of Obstetrics and Gynecology, 1954

Graduate Training

Student Fellow in General Pathology, University of Rochester School of Medicine and Dentistry, 1943.

Intern in Surgery, Yale New Haven Hospital, 1945-1946.

Assistant Resident in Obstetrics-Gynecology, Strong Memorial Hospital and Rochester Municipal Hospital, 1946-1947.

Resident in Obstetrics-Gynecology, Strong Memorial Hospital and Rochester Municipal Hospital, 1947-1948.

Fellow in Psychiatry, University of Rochester School of Medicine and Dentistry, 1948-1949.

Chief Resident in Obstetrics-Gynecology, Strong Memorial Hospital and Rochester Municipal Hospital, 1949-1950.

Post Graduate Appointments

Instructor (Full time) in Obstetrics-Gynecology and Assistant Obstetrician-Gynecologist, 1950-1954.

Assistant Professor (Full time) in Obstetrics-Gynecology and Associate Obstetrician-Gynecologist, 1954-1960.

Associate Professor (Full time) of Obstetrics-Gynecology and Senior Associate Obstetrician-Gynecologist, 1960-1966.

All of the Above at the University of Rochester School of Medicine and Dentistry and Strong Memorial and Rochester Municipal Hospitals.

Professor (Full time) of Obstetrics-Gynecology and Obstetrician-Gynecologist, University of Rochester School of Medicine and Dentistry and Strong Memorial Hospital, 1966-present.

Consultant in Obstetrics-Gynecology, The Genesee Hospital, Rochester, New York, 1960-present.

Professional Societies

Monroe County Medical Society

New York State Medical Society

American Medical Association

National Board of Medical Examiners

Associate Examiner, American Board of Obstetrics and Gynecology, 1961-present

American College of Obstetricians and Gynecologists

American Psychosomatic Society

Departmental Representative, Association of Professors of
Gynecology and Obstetrics

American Association for the Advancement of Science

New York Academy of Sciences

Current Research Interests

Red cell and plasma volumes before and during early pregnancy; normative values.

Correlations of hypovolemia and hypervolemia with obstetric and medical complications.

Psychosomatic aspects of obstetrics and gynecology.

Studies in medical education.

Special Academic Responsibilities

1. Intradepartmental, Obstetrics-Gynecology

Director, Maternal Continuity Clinic, 1960-present

In charge, Out Patient Teaching, 1954-present

2. Interdepartmental, Medical School

Member, Curriculum Committee, 1955-1962

Chairman, Exploring Group for General Clerkship,
1962

Member, Planning Committee for the General Clerkship,
1963-1965

Member, Committee for Teaching of General Clerkship,
1966-present

Member, Internship Advisory Committee, 1955-present

Member, Committee for Interdepartmental Seminars,
1958-1964

Member, Medical School Admissions Committee, 1966-present

Chairman, Committee for the Study of the Educational Program, 1963-present

3. University of Rochester

Member, University Senate, 1966-1968

Member, Committee for the Improvement of Teaching, 1967-present

Publications

(22 publications listed)

APPENDIX F

Deposition of Dr. George Wilbanks

(Taken in Chicago on April 12, 1973, and received in evidence as an exhibit offered by Defendant GE in *Gilbert v. General Electric Company*, U.S.D.C.E.D. Va., Richmond Division, Civil Action No. 142-72-R, a class suit which presents the issue of whether GE discriminates because of sex in violation of Title VII of the Civil Rights Act, 42 USC 2000e, by refusing to provide income maintenance during absences due to pregnancy-related disabilities and child-birth when GE provides such income maintenance during absences due to other disabilities. See earlier reported decisions relating to procedural issues in same case, 347 F. Supp. 1058, 5 FEP Cases 74, 197 986, 989.)

1 DR. GEORGE WILBANKS being previously sworn, testified as follows:

Direct Examination

By Mr. Kammholz:

* * * * *
Q. Are you currently practicing your profession in Illinois? A. Yes, I am.

Q. And what is that profession?

* * * * *
8 Q. Should pregnant women be restricted from physical activities during pregnancy? A. If the pregnancy is not complicated, no. We do not recommend any real limitation of activities on our patients.

Q. Can pregnant women continue to hold gainful employment during pregnancy? A. Yes. As a matter of fact, two of our office nurses now are both pregnant.

Q. And when I ask you about holding gainful employment, for what period of pregnancy and how long prior to delivery? A. We don't make any restrictions on this. A woman may work as long as the pregnancy is progressing

normally, even up until time of delivery.

9 We recently had one of our nurses go into labor while on duty and she delivered at the end of the shift without complication.

Q. You would say this is indeed an efficient utilization of woman power in the hospital? A. Yes, a woman will do this at home. For example, in caring for children and taking care of her general household duties, she will not go to bed for the last six weeks or so.

Q. Would the lifting of weights or the climbing of stairs during pregnancy be harmful? A. I will merely say "no."

Q. Are there any particular kinds of jobs you would restrict pregnant women from performing during pregnancy? A. Probably one or two that you might restrict pregnant women on. There have been some data recently on nurse-anesthetists who work in operating rooms with various anesthetic gases and there seems to be some increase in abortion in women who work in these noxious fumes. Therefore, any type of occupation in which
10 the person was exposed to certain chemical fumes, that might have an effect on the fetus, I think should be limited.

I would imagine that in most jobs the safety factor would control this so that probably no one should be in that much of an atmosphere.

As a matter of fact, in relation to our anesthetics, we are now making certain that the gas is exhaled by the patients and conducted out of the operating room by an exhaust tube rather than just into the air as we have been doing it for many years.

• • • • •

Q. Other than the example you just have referred to, are there jobs you would restrict pregnant women from performing? A. Offhand I would not think of any. The patients that I have had in pregnancy have been proceeding normally and we have not suggested change
12 in jobs. I cannot recall one.

Q. What about the physical activity, such as golfing, bowling, horseback riding? A. Well, our usual recommendation to the patient is that they continue their usual activities at a reasonable rate. If a woman plays golf or tennis, does horseback riding, then it is suggested they may continue whatever they are used to. About the only thing we suggest is "don't over exert" in connection with what they are normally used to.

Q. Does pregnancy affect coordination? A. I would say generally not. The only thing that might affect it would be in very late pregnancy, protuberant abdomen, very much as in a man or anyone who was twenty or thirty pounds overweight and had a protuberant abdomen. It would be, under those conditions, a little more difficult to get around.

As a matter of fact, one of my patients who played a lot of golf said that playing golf during pregnancy caused her game to improve because she had to hold
12 her left arm straight in order to get around the uterus.

Q. Doctor, does pregnancy affect judgment? A. I would say not. Women care for their families, purchase groceries and, insofar as I know, their judgment is still good.

Q. Does pregnancy affect I.Q.? A. No, not that I am aware of.

Q. Doctor, do you consider the period of labor and delivery as times of periods of sickness? A. Well, this is still part of the normal process of pregnancy. I guess the delivery and labor would be the ultimate of this sort of altered process but I would not really define it as illness, I think, unless there is something abnormal.

In the majority of labor and deliveries there are no difficulties. However, there are a small percentage that may be abnormal.

Q. Are the periods of labor and delivery accompanied by pain or at least extreme discomfort? A. Yes. I would say it is probably a majority that would be. I have
13 seen women who were well controlled, have done

lamaze exercises in connection with natural childbirth and really have had very little discomfort during labor.

• • • • •

Q. Let me restate it. I think you may have answered it. Are the conditions of labor and subsequent delivery conditions of disease? A. No. As I have defined it, pregnancy, which would include labor and delivery, is a normal process. I don't think anyone would want to walk back from the labor room, although this has been done and although I would not class it as a disease.

• • • • •

15 Q. What about the period after childbirth—is it a period of sickness? A. It is a period of return of the altered state of physiology back to the more usual states but, again, I think there is a normal process of involution of the uterus, return of the uterus to normal size and other body functions that also return to the pre-pregnancy state.

• • • • •

Q. In terms of physiology, how long is the period for the return to the normal state? A. Characteristically it has been defined as six weeks. Now, Dr. Williams at Johns Hopkins, one of the grandfathers of American obstetrics, did some studies indicating that the uterus returned to its normal state, at least the placental area, after birth

16 or no later than six weeks and so most people have used this as their norm, I would say, for return to normal.

Q. To put it another way, is it fair to say then that the return to normal physiology occurs over a roughly six-week time span and that is a six-week return as contrasted to nine months during which the altered physiology developed? A. Right.

Q. Prior to delivery? A. Yes, I think that would be correct. Certain things return to normal much faster than others. Certainly, for example, the hormone levels return

to normal within forty-eight hours after delivery. It is more of a progressive thing over, roughly, a six-week period.

Q. During this six-week period, normally, is a woman disabled? A. Certainly in the early part of this I think she would be somewhat disabled. We send patients home now in three days, suggesting they take it a little easy for a couple of weeks, but most of the women are back taking

care of their families fairly shortly after this. Most
17 of the families now do not live in the same town with Mama or Grandmother and so they are back pretty much taking care of their house and the new baby as soon as they go home.

For example, I understand, in relation to a young woman who was finishing her residency at one of the neighboring hospitals, she was out for a total of two weeks from her internship with her first pregnancy, I guess it was. She was back working in two weeks. Therefore, this becomes quite a variable thing, I think.

Q. Did the two weeks cover the pre-delivery, delivery and post-delivery period? A. Yes. We do not usually recommend this but it is being done.

Q. You referred earlier, Doctor, to abnormal pregnancy. Would you tell us, please, about the kind of abnormalities that occur in connection with pregnancy and delivery? A. Probably I can group abnormalities, as we do for teaching
medical students, into three trimesters of pregnancy,
18 the first three months, the middle three months and the last three months.

Abnormal pregnancies in the first three months are usually related to some mal-development of the embryo, resulting in abortion called a spontaneous abortion. That would be by far the most common abnormality or complication in early pregnancy.

In the mid-trimester, again, this is a relatively innocuous time during pregnancy, if you will, and about the only thing that occurs during the middle trimester is a rather rare

condition called "the incompetent cervix—maybe this is too detailed—in which there may be an early delivery.

An immature delivery, in the last trimester, really one of the few, I guess we call it a disease state, something which complicates pregnancy is called a "toxemia pregnancy," which is a complex of high blood pressure, swelling and some kidney problems. Then abnormal pregnancies around the time of labor and delivery would be usually problems with bleeding due to some abnormalities associated with the placenta, the afterbirth.

• • • • •
25 Cross-Examination

By Ms. Ruth Weyand

• • • • •
56 Q. Now, Doctor, I am going to read you a question and an answer given by William C. Keettels, who is head of the Department of Obstetrics and Gynecology, University Hospitals, Iowa State University.

The question and answer I am going to read to you was given as a part of a deposition in Heinen v. Johnston Community School District before the Iowa Civil Rights
57 Commission, taken on October 9, 1972, by the Attorney General of the State of Iowa. The portion that I am going to read to you appears on page 21 of the deposition. Now, you have to go a little way back to get into the whole thing.

It reads as follows:

"It is kind of interesting about how people, how the medical profession changes. As you know, there was a time when women had to stay in bed for fourteen days after delivery and it took a long time before ambulation, and allowing them out of bed came about, and you can just see how the transition that occurred, that many doctors were so opposed to this, and all sorts of dire consequences would develop but it just took time before they accepted this.

Now everybody accepts ambulation within a few hours after delivery as perfectly acceptable."

Now, we come to the question—"Would we be in a same kind of transition period perhaps with the pregnant female working up until time of delivery?"

The answer—"I think yes. It has been a transition but I think we have made it now. The majority would accept that they could work up to term."

58 Now, Doctor, would you agree on that estimate of position taken by one of your medical profession? Would you agree with that statement? A. Yes. I would agree because, as I have stated earlier, insofar as our patients are concerned, they may work up until term.

Q. You agree the medical profession is in agreement today, the majority of them, following the same practice as far as you know? A. I can speak for those that I know.

Q. They do? A. Yes. I cannot, however, speak for the whole medical profession but I would agree with this. It is our practice in our own hospital.

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APPENDIX G**Curriculum Vitae**

GEORGE DEWEY WILBANKS, JR.

Born: February 24, 1931 Gainesville, Georgia

Married: July 31, 1954—Evelyn Freeman Rivers—
B.A. Wellesley, 1954
M.A. Duke University, 1956

Children: George Rivers—Born: May 21, 1958
Wayne Freeman—Born: October 18, 1960

Education:

HIGH SCHOOL: Riverside Military Academy, Gainesville,
Georgia
H.B. Plant High School, Tempa, Florida
Graduated June 19, 1949

COLLEGE: Duke University—A.B., June, 1953
University of Florida—Summer, 1951

MEDICAL SCHOOL: Duke University School of Medicine—
M.D., June, 1956

INTERNSHIP: Pennsylvania Hospital, Rotating, June
1956-June 1957

RESIDENCY: OB-GYN, Duke Medical Center, July 1957-
June 1961

Fellow-OB-GYN Pathology—Boston Lying-
In Hospital and Free Hospital for
Women, January-June 1959

Professional Experience:

Resident Instructor, Dept. OB-GYN, Duke Medical Center,
July 1961-June 6.

Clinical Instructor, Dept. OB-GYN, Univ. Oklahoma School
of Medicine, March 1963-June 1964

Associate, Dept. OB-GYN, Duke Medical Center, July 1964-June 1965

Special Fellow, National Cancer Institute, Dept. OB-GYN & Pathology, College of Physicians & Surgeons, Columbia-Presbyterian Medical Center, New York City, July 1964-July 1965

Assistant Professor, Dept. OB-GYN, Duke Medical Center, July 1965-December, 1969

Associate Professor, Dept. OB-GYN, Duke Medical Center, Jan.-June, 1970

Director, Gynecologic Oncology Division, July 1967-July 1970

Professor & Chairman, Dept. OB-GYN, Rush Medical College, Chicago, Illinois, July 1970—

Hospital Appointments:

Chairman, Department of Obstetrics & Gynecology, Rush Presbyterian-St. Luke's Medical Center, Chicago, Illinois, July, 1970—

Military Service:

Captain, USAF, Assistant Chief, OB-GYN Service, 2792 USAF Hospital Tinker Air Force Base, Oklahoma, July 1962-June 1964

Board Qualification:

American Board of Obstetrics & Gynecology, Diplomate 1965

Florida Board of Medical Examiners, 1956

North Carolina Board of Medical Examiners, 1956

Illinois Board of Medical Examiners, 1970

Society Memberships:

American College of Obstetricians & Gynecologists, Fellow

American College of Surgeons (Fellow)

Society of Pelvic Surgeons

Society of Gynecologic Oncologists
American Association of Cancer Research
American Society of Clinical Oncology, Inc.
American Society for Cytology
Tissue Culture Association
American Association for Advancement of Science
American Society of Colposcopy and Colpomicroscopy
Bayard Carter Society of Obstetricians & Gynecologists
Baker-Channing Society
Ex-Residents Association of Pennsylvania Hospital
International Society for Prevention of Cancer
American Medical Association

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Publications:

(35 publications listed)

APPENDIX H

Deposition of Dr. William C. Keetels, M.D.

(Taken by the complainant at Iowa City, Iowa, on October 9, 1972, in *Heinen v. Johnston Community School District*, Iowa Civil Rights Commission.)

* * * * *

2 WILLIAM C. KEETELS, M.D., called as a witness by the complainant, being first duly sworn the Certified Shorthand Reporter, was examined and testified as follows:

Direct Examination

By Ms. Conlin:

Q. State your name. A. William C. Keetels.

Q. Your address, doctor? A. University, Department of Obstetrics and Gynecology, University Hospitals, Iowa City, Iowa.

Q. What is your occupation? A. Obstetrician and gynecologist, and head of the Department of Obstetrics and Gynecology.

Q. Doctor, are you licensed to practice medicine in the State of Iowa? A. Yes.

* * * * *

Q. What was the preparation for your specialty?

A. A complete residency training in obstetrics and gynecology, and then I have been taught at the University of Wisconsin, and then was in charge of obstetrics and gynecology at the Manhattan District project, and I have
3 been teaching in the Department since then. I am certified by the American Board of Obstetricians and Gynecologists, and I am a director and vice president of the American Board of Obstetrics and Gynecology.

Q. When were you certified, doctor? A. '42.

* * * * *

Q. Have you done any writing in the area of obstetrics and gynecology? A. Yes. I am the author of 65 articles

dealing with various aspects of obstetrics and gynecology.

Q. Are you on the staff of any hospitals? A. Yes, here, staff of the University Hospital. This is a closed teaching staff hospital, so we don't have privileges in other hospitals, nor do other doctors have privileges here, so I am on the staff of this hospital.

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6 Q. Can you give us a percentage of employed women as opposed to—by “employed”, doctor, I mean employed outside the home? A. In my practice, I would say that the majority of people are housewives, but in our practice that we deal with in the department we have what we called the clinical pay, which are student wives, and I would feel that 70 per cent—50 to 75 per cent of these are not only housewives but they are gainfully employed as teachers, or stenographers, or in other activities.

Q. How do you generally advise your patients and/or advise your students to advise their patients with respect to the condition of pregnancy and continued employment?

A. Well, we tell them that pregnancy is a physiologic process and that the average pregnant woman has no problems during the course of pregnancy, so that she can carry on her household duties, and she can also carry on any gainful employment up to the time of delivery. Now, if there is an obstetric complication or medical problem, then the physician would decide that this shouldn't be carried out, that she shouldn't be employed, but there are

7 only probably about between 5 and 10 per cent of pregnant women that have complications, so that we teach our medical students that this is a physiologic process and that a woman is best active and doing just what she did before she became pregnant, and that includes sports too. In other words, if they like to ride horseback, or play tennis, or swim, why, we allow them to carry on any activity that they did prior to pregnancy in the pregnant state.

Q. I am going to ask you to assume the following facts for the purpose of a few questions, doctor, and they are as follows:

Assume a married female, age 24, in her first pregnancy, whose due date is October 23rd, 1972. She has gained approximately 25 pounds and is under a doctor's care, and her condition is satisfactory. She wants to continue to work. Her job is that of an art teacher. She teaches kindergarten through sixth grade. In her job she moves from room to room pushing a cart of art articles. She teaches 600 plus students divided into 25-student classes. Her class periods range from $\frac{1}{2}$ to one hour each, that she generally remains standing throughout the class periods moving from desk to desk, or table to table, and bending over to check on the students' work. Her day begins around 8, and she leaves around 4 and spends 6 to 6 $\frac{1}{2}$ hours in class, and she has held this same job for 2 years. Four of the classrooms are located at a former army facility known as Camp Dodge. She is required to drive there, 3 miles. Once every 6 school days she teaches in a barracks and is required to walk up and down one flight of stairs, going in and coming out of that building. Assume further that she is able to stoop, bend over and touch her toes, crouch, and perform all other normal movements without difficulty; that she is currently doing regular household chores such as shopping, cleaning, gardening, et cetera; that she testifies that she is not tired or fatigued, and suffers no difficulty or disability because of her condition. She is taking the following medication: Vitron C, mol-iron capsules and diuril. Based on those facts, doctor, do you have an opinion, based on a reasonable degree of medical and obstetrical certainty, as to this woman's ability to perform her duties as a school teacher?

A. I think that she could perform these activities without any problem. I see no contrary indication to her being gainfully employed.

Q. Do you have an opinion as to this woman's or any reasonably healthy school teacher's general ability to function, whether or not it is impaired at the 5th or subsequent months of pregnancy? A. No, I think that they can work up to term, to delivery with no impairment, providing there is no medical complication.

9 Q. Is there any reason that a pregnant woman should discontinue her employment? A. Not in my opinion. Here at the University Hospitals we have changed. At one time women all had to stop work at the fifth month, but now they can work to term, and it is up to the woman and her physician to determine how they are getting along. Then, they can go back to work as soon as the physician and the patients decides that they can. They work in the operating room, and in many areas where they have to be on their feet for long periods of time. Now, the only problem—there is no problem, but if they feel that they can't carry on their duties as a nurse, why, then they wouldn't work, but this would be up to the patient and the physician, and it is very seldom this ever occurs, interferes with their working as a nurse and doing it well.

Q. Do you personally know, or have you treated any women, doctor, whose employment has had a detrimental effect, either on her health or on the health of her offspring? A. No.

Ms. Conlin: That is all.

Cross Examination

By Mr. Gaudineer:

Q. Doctor, may I ask you, then, as far as you are concerned, medically speaking, barring complications— A. Yes.

10 Q. —that any pregnant female is capable of working up until the onset of labor? A. Yes.

• • • • •

Q. My question is, barring this 5 to 10 per cent, or barring medical reasons only—I am talking about the typical pregnant woman. A. I don't see any reason why she shouldn't work up to term.

Q. If she desired to not work up to term? A. That is between her and her employer. It is not a medical—

Q. It is not a medical problem? A. Yes.

Q. You would so advise the employer that, medically speaking, or as far as you are concerned, she was capable of continuing her employment? A. That is correct.

Q. Is there an increase in the last two months of the pregnancy for the female to direct, what, more of
11 her attention toward that pregnancy with the change in her body, and what have you? A. Oh, I think as a woman approaches term she wonders when she is going to go in labor, and is the baby going to be normal, and things of this type, but I don't think it interferes with their functioning in a capacity, how they are employed, in other words.

Q. It wouldn't interfere medically, as far as she is concerned, with her employment? A. No. Mostly, I don't either.

Q. What emotional effect might this have as far as others in the employment, this would not be a medical problem? A. They are just like with all people. I mean there are certain people that—well, they have a cold. Why, they say they feel bad, and they tell everyone about it. Other people can have a cold and there is no problem about it other than the contagiousness of it, that they just go about their duties. So pregnant women vary too, in other words. Some pregnant women, I am sure that they want people to feel a little sorry for them, or something like this, but mostly, really, I can't see any difference.

• • • • •

14 Q. As a doctor, what would you certify to the employer concerning the capabilities of the patient af-

ter delivery? A. I would feel that in a month they are capable of going back and being employed.

Q. It would not be the 2 weeks? A. Well, they can in 2 weeks, but I think—

Q. Medically speaking are they capable in 2 weeks? A. Yes, in 2 weeks they are.

15 Q. So if they did not go back for a month that would be something between her and the employer? A. Yes.

Q. So really, as far as you are concerned— A. But after—I think that 2 weeks would be the bare minimum time because they are sore and have an episiotomy soreness, and are still bleeding, so I think probably the mean would be around 4 weeks.

Q. Do you have a maximum normal pregnancy, normal delivery? A. I would say that 6 weeks would be the maximum. Minimum, two except with the exception of nursing.

Q. This is something you really can't tell until after delivery? A. That is correct.

Q. Do I understand you, then, that from your point of view that the actual time a woman would be incapable of performing her services, from a medical standpoint, only because of pregnancy and delivery, would be a mean of 4 weeks, and a maximum of 6 weeks? A. After delivery.

Q. What about—I thought she is working up until the onset of labor? A. Yes, worked up to the onset of labor.

Q. And hopefully she is in labor for what, 8 hours? 16 A. 8 to 12 hours.

Q. Okay. So, outside of the day of delivery, then, we are just talking about a mean of 4 weeks, or maximum of 6 weeks afterwards? A. Yes.

Q. That should be all the time that they should lose from their employment? A. Yes.

18 Q. Is it still an acceptable standard also that a pregnant female should leave her employment any—

where from 4 to 6 weeks prior to delivery to become acclimated to the home, and acclimated to the time of delivery, and such? A. I think—no, I don't think that is necessary.

Q. Well, necessary or unnecessary, is it an acceptable standard? A. Why—

Q. If a doctor would practice that, would that be
19 an acceptable medical standard? A. It would be acceptable if he practiced that way. It would be acceptable if he didn't.

Q. Well, that is my question. Yes or no, one way or the other, it is still an acceptable medical standard? A. Either way, it is acceptable.

Q. Would it be an acceptable medical standard for a doctor, in consultation with the pregnant patient, to decide with her that perhaps she should not continue her employment past 3 months of pregnancy, and thereafter certify to her employer that she should be allowed a leave of absence because of that pregnancy? A. No, I have never heard of that.

Q. Do you know whether that would be acceptable if a doctor did practice it, or acceptable if he did not practice it? A. I would say that if he did practice it, most of his colleagues would think he was awful conservative in his attitude, and they wouldn't agree to it.

Q. Would they disturb it? A. No, because people, in their private practice of medicine, do a lot of things that some of us might not approve of. As long as it isn't illegal, or a poor practice, why, they wouldn't do anything about it.

Q. Would that be a poor practice? A. In my opinion,
20 ion, it would be, but it is such a—it isn't enough of a misdemeanor that you could do anything about it. That is the point I am making.

Q. In the professional realm, it would not be sufficient? A. No, it wouldn't.

Q. What about 6 months? A. Again, I think that that is an undue period of time.

Q. Would that be likely to be more acceptable to a larger majority of the practice than the 3 month position? A. Well, I think the medical profession has really swung around now to the fact—the knowledge that a pregnant woman can work right up to term and not have any—accrue any disadvantage, so that 10 years ago I think that 6 months would have been a common practice, but today it wouldn't.

Q. Would 7 months? A. Well, it is the same way.

Q. 8 months? A. The same way.

Q. Are you acquainted with other doctors who have been practicing for 10 or more years? A. Yes.

Q. Are you acquainted with whether or not they generally advise that they work directly up to term time, or whether or not some of them advise that they take a
21 leave of absence some weeks prior to the projected term? A. Oh, I am sure there would be some older physicians that would probably advise that they take a leave of absence.

Q. Some weeks prior to term? A. Yes. It is kind of interesting about how people—how the medical profession changes. As you know, there was a time when women had to stay in bed 14 days after delivery, and it took a long time before ambulation, and allowing them out of bed the first day came about, and you can just see the transition that occurred, that many doctors were so opposed to this, and all sorts of dire consequences would develop, but it just took time before they accepted this, and now everyone accepts ambulation within a few hours after delivery as perfectly acceptable.

Q. Would we be in that same kind of a transition period perhaps with a pregnant female working up until term? A. I think, yes, it has been a transition, but I think we have made it now. The majority would accept that they could work up to term.

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SUPREME COURT, U. S.**

IN THE
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OCTOBER TERM, 1973

No. 72-1129

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Petitioner,

—v.—

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**MOTION OF AMERICAN CIVIL LIBERTIES UNION; AMERICAN
FEDERATION OF TEACHERS, AFL-CIO; AMERICAN JEWISH
CONGRESS; AND NATIONAL ORGANIZATION FOR WOMEN,
LEGAL DEFENSE AND EDUCATION FUND, FOR LEAVE TO
FILE BRIEF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE***

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INDEX

	PAGE
Motion for Leave to File Brief <i>Amici Curiae</i>	1
Brief of <i>Amici Curiae</i>	5
Interest of <i>Amici</i>	5
Statement of the Cases	6
Summary of Argument	6

ARGUMENT:

I. Involuntary termination of a woman's employment, solely on the ground that she has reached a fixed stage of pregnancy, constitutes sex discrimination	9
A. Judicial authority	10
B. Legislative, executive and administrative pronouncements	14
II. Regulations that force a woman out of employment at a fixed stage of pregnancy operate as "built-in headwinds" that drastically curtail women's opportunities	18
III. School board regulations mandating involuntary termination of a teacher's employment at a fixed stage of pregnancy are inconsistent with the equal protection clause of the fourteenth amendment	22

A. The challenged regulations establish a suspect classification	23
B. The challenged regulations unreasonably condition the exercise of a right of fundamental constitutional dimension	27
C. The classification made in the challenged regulations does not advance a substantial governmental interest in a reasonable manner	32
CONCLUSION	36

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Cases:

Aiello v. Hansen, — F. Supp. — (N.D. Calif. May 31, 1973)	12, 32
Andrews v. The Drew Municipal Separate School, — F. Supp. —, No. GC 73-20-K (N.D. Miss. 1973)	10
Boraas v. Village of Belle Terre, 476 F.2d 806 (2d Cir. 1973)	23
Bray v. Lee, 337 F. Supp. 934 (D. Mass. 1972)	25
Brenden v. Independent School District, 41 U.S.L.W. 2590 (8th Cir. April 18, 1973)	25
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Commissioner of Internal Revenue v. Moritz, No. 72-1298 (March 22, 1973)	26
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Doe v. Bolton, 93 S. Ct. 739 (1973)	27, 29
Doe v. Osteopathic Hospital, 333 F. Supp. 1357 (D. Kan. 1971)	12, 16
Eisenstadt v. Baird, 405 U.S. 438 (1972)	31
Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1973) ..	13, 23, 25
Frontiero v. Richardson, 93 S. Ct. 1764 (1973)	26, 27, 34
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Griggs v. Duke Power Co., 401 U.S. 424 (1971)	19
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Hoyt v. Florida, 368 U.S. 57 (1961)	24

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Muller v. Oregon, 208 U.S. 412 (1908)	20
Ordway v. Hargraves, 323 F. Supp. 1155 (D. Mass. 1971)	10, 12
Orloff v. Willoughby, 345 U.S. 83 (1953)	31
Orner v. Board of Appeals, Superior Court of Baltimore City, Case No. 132,572, July 28, 1972	12
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Reed v. Reed, 404 U.S. 71	24, 25, 26, 34
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Constitutional Provisions:

United States Constitution	
Fourteenth Amendment	6, 13, 22

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State Statutes:

Connecticut §31-236(5), repealed by P.A. 140, L. 1973, effective October 1, 1973	17
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Rule:

29 CFR 1604.10	15
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AMERICAN FEDERATION OF TEACHERS, AFL-
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TIONAL ORGANIZATION FOR WOMEN, LEGAL
DEFENSE AND EDUCATION FUND, FOR LEAVE
TO FILE BRIEF *AMICI CURIAE***

Amici respectfully move, pursuant to Rule 42 of this Court's Rules, to file the within brief *amici curiae*. Counsel for the petitioner in *Cohen v. Chesterfield County School Board*, #72-1129, 474 F.2d 395 (1973), and counsel for the respondent in *La Fleur v. Cleveland Board of Education*, #72-777, 465 F.2d 1184 (1972), have consented to the filing

of this brief; counsel for the respondent in *Cohen v. Chesterfield County School Board*, *supra*, and counsel for the petitioner in *La Fleur v. Cleveland Board of Education*, *supra*, have refused consent.

The American Civil Liberties Union is a nationwide, non-partisan organization of over 200,000 members dedicated to defending the right of all persons to equal treatment under the law. Recognizing that discrimination against women permeates society at every level, and is often reinforced by governmental action, the American Civil Liberties Union has established a Women's Rights Project to work toward the elimination of sex-based discrimination. *Amicus*, American Civil Liberties Union, believes that these cases concerning the rights of pregnant working women pose constitutional issues of great significance to the achievement of full equality under the law between the sexes and to the guaranty of the right to privacy. Lawyers for the American Civil Liberties Union were counsel in *Struck v. Secretary of Defense*, #72-178, 460 F.2d 1372 (9th Cir. 1971, 1972), *cert. granted*, 409 U.S. 947 (1972), judgment vacated and remanded for consideration of mootness when the Air Force waived Captain Struck's discharge shortly after her brief was filed. The Brief for Petitioner in *Struck*, filed with this Court on December 8, 1972, discussed in detail the constitutional issues raised by the involuntary discharge of pregnant military officers, in particular, and of pregnant gainfully employed women, in general. With regard to the general problem of discrimination on account of sex that is presented in these cases, lawyers for the American Civil Liberties Union presented the appeal in *Reed v. Reed*, 404 U.S. 71 (1971), and acted as *amicus curiae* in *Frontiero v. Richardson*, 93 S. Ct. 1764 (1973).

American Federation of Teachers, AFL-CIO (AFT), is a national organization founded in 1916. It is a federation of local teacher unions. At present the affiliated locals number more than 1,000, and the total membership of the AFT is about 400,000. Its membership consists almost exclusively of classroom teachers—many of whom are women and, therefore, vitally interested in this litigation. The AFT is a labor organization affiliated with AFL-CIO, and its purpose is to improve education and to work for the well-being of classroom teachers throughout the United States, as well as some foreign countries.

The American Jewish Congress was formed in part "to help secure and maintain the equality of opportunity . . . to safeguard the civil, political, economic and religious rights of Jews everywhere" and "to help preserve and extend the democratic way of life." It has a special interest in assuring equal recognition of the social, economic and political interests of minority groups and it combats discrimination against such groups whether on grounds of race, religion, national origin or sex.

The National Organization for Women (NOW) is a non-profit, civil rights organization of over 25,000 women and men members and 550 chapters throughout the United States. NOW was organized in 1966 and is existing for the purpose of securing full and equal social, political and economic rights for women. One of its chief areas of concern and one to which millions of American women look to NOW for leadership is equal employment opportunity. NOW is acutely interested in the outcome of these suits since they will affect the employment rights of every woman of child-bearing years, many of its own members being affected and potentially affected.

The purpose of this brief is to argue that automatic termination of a public school teacher's employment on the

sole ground that she is pregnant violates the fourteenth amendment, and that, accordingly, the decision below in *Cohen*, upholding such termination, should be reversed, and the decision below in *La Fleur*, holding such termination unconstitutional, should be affirmed. Because these are the first cases in which the question will be heard by this Court, we believe our brief will be of substantial assistance to the Court in the resolution of the issues raised by these cases.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1129

SURAN COHEN,

Petitioner,

—v.—

CHESTERFIELD COUNTY SCHOOL BOARD and DR. ROBERT F. KELLY,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-777

CLEVELAND BOARD OF EDUCATION,

Petitioner,

—v.—

JO CAROL LA FLEUR and ANN ELIZABETH NELSON,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**BRIEF OF AMERICAN CIVIL LIBERTIES UNION;
AMERICAN FEDERATION OF TEACHERS, AFL-
CIO; AMERICAN JEWISH CONGRESS; and NA-
TIONAL ORGANIZATION FOR WOMEN, LEGAL
DEFENSE AND EDUCATION FUND, AMICI CURIAE**

Interest of Amici

The interest of *amici* appears from the foregoing motion.

Statement of the Cases

Amici incorporate the Statement of the Cases by the Petitioner in *Cohen v. Chesterfield County School Board*, #72-1129, 474 F.2d 395 (1973), and by the Respondent in *La Fleur v. Cleveland Board of Education*, #72-777, 465 F.2d 1184 (1972).

SUMMARY OF ARGUMENT

I.

School board regulations requiring termination of the employment of teachers at a fixed stage in the pregnancy cycle reflect arbitrary notions of a woman's place wholly at odds with contemporary legislative and judicial recognition that individual potential must not be restrained, or equal opportunity limited, by law-sanctioned stereotypical prejudgments. Operating on the basis of characteristics assumed to typify pregnant women, and in total disregard of individual capacities and qualifications, the regulations violate the equal protection clause of the fourteenth amendment to the United States Constitution.

The regulations single out pregnancy, a physical condition unique to women involving a normally brief period of disability, as cause for involuntary termination of employment at a uniform date that bears no relationship to the individual teacher's ability to continue working. No other physical condition occasioning a period of temporary disability is similarly treated. Pregnancy apart, a flexible policy applies allowing for consideration of individual cir-

cumstances. As increasingly confirmed by judicial authority, as well as legislative, executive and administrative pronouncements, regulations applicable to pregnancy more onerous than regulations applicable to other temporary conditions discriminate invidiously on the basis of sex.

II.

Heading the list of arbitrary barriers that have plagued women seeking equal opportunity is disadvantaged treatment based on their unique childbearing function. Until very recent years, jurists have regarded any discrimination in the treatment of pregnant women as "benignly in their favor." But in fact refusal to permit capable, healthy pregnant women to continue working drastically curtails women's economic opportunities. In addition to the immediate loss of needed income, fringe benefits may be forfeited, and opportunities for new employment severely reduced.

III.

Regulations mandating termination of a school teacher's employment at a fixed stage of pregnancy, without regard to her preference and her physician's certification of her ability to continue teaching, establish a suspect classification for which no compelling justification exists. Moreover, they impinge upon exercise of the fundamental right to decide whether or not to bear a child and, on that account as well, must be scrutinized closely. Even measured by a less exacting review standard, the regulations must be declared constitutionally impermissible, for they arbitrarily restrict women's access to employment opportunity without promoting any substantial state interest.

Concern for the health of a pregnant woman hardly justifies an iron rule dealing with all pregnancies in an identical, dehumanizing fashion. Continuity of instruction is deserved by ordering a teacher out of her classroom while the term is in full swing. Administrative convenience may not be invoked to excuse a conclusive presumption of unfitness or disqualification. And it is ludicrous to suggest that a pregnant teacher, young and robust as she may be, needs protection against accident and assault more than a man or woman of a certain age with ulcers, high blood pressure or a heart condition.

Because the challenged regulations rely on a sex-based stereotype no less invidious than one racial or religious, establish a conclusive presumption which is factually unjustified, exclude from consideration the fitness of the individual, and treat pregnancy differently from any other physical condition occasioning a period of temporary disability, they deprive pregnant teachers of the equal protection of the laws.

ARGUMENT

I.

Involuntary termination of a woman's employment, solely on the ground that she has reached a fixed stage of pregnancy, constitutes sex discrimination.

"Nobody—and this includes Judges, Solomonie or life tenured—has yet seen a pregnant male."¹ Does disadvantaged treatment of women based on a physical condition no man can experience constitute sex discrimination? Jurists whose perspective reaches beyond the observation that "it can't happen to a man," have answered emphatically "Yes." *E.g.*, *Buckley v. Coyle Public School System*, 476 F.2d 92, 95 (10th Cir. 1973); *Green v. Waterford Board of Education*, 473 F.2d 629 (2d Cir. 1973); *La Fleur v. Cleveland Board of Education*, 465 F.2d 1184 (6th Cir. 1972).

Sex discrimination exists when all or a defined class of women (or men) are subjected to disadvantaged treatment based on stereotypical assumptions that operate to foreclose opportunity based on individual merit. "Discrimination is not to be tolerated under the guise of physical properties possessed by one sex." *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971). Nor is discrimination tolerable when its impact concentrates on a portion of the protected class, for example, married women, mothers, or pregnant women. *Sprogis v. United Air Lines, Inc.*,

¹ Adapted from Chief Judge Brown's opinion dissenting from denial of a motion for rehearing *en banc* in *Phillips v. Martin Marietta Corp.*, 416 F.2d 1257, 1259 (5th Cir. 1969), *vacated and remanded*, 400 U.S. 542 (1971).

supra; *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); *Cerra v. East Stroudsburg Area School District*, 450 Pa. 207, 299 A.2d 277 (1973).²

The Cleveland and Chesterfield County school board regulations terminating the employment of an expectant mother during the fifth month of pregnancy³ are blatant examples of stereotypical prejudgment that shuts out consideration of individual capacity. The regulations single out pregnancy, a physical condition unique to women involving a normally brief period of disability, as cause for deprivation of the right to work. No other physical condition occasioning a period of temporary disability, whether affecting a man or a woman, is similarly treated. Pregnancy apart, leaves of absence for medical reasons are considered on an individual basis; if the disability is temporary, medical leave with pay is granted to both male and female teachers during convalescence.

A. Judicial authority.

Pregnancy regulations similar to the ones at issue here have not withstood dispassionate judicial analysis. The trend of opinion is abundantly clear: regulations applicable to pregnancy more onerous than regulations applicable to

² Cf. *Andrews v. The Drew Municipal Separate School*, — F. Supp. —, No. GC 73-20-K (N.D. Miss. July 3, 1973) (unwed mother teacher-aides); *Jinks v. Mays*, 332 F. Supp. 254 (N.D. Ga. 1971), *aff'd in part and remanded in part*, 464 F.2d 1223 (5th Cir. 1972) (pregnant nontenured schoolteachers); *Ordway v. Hargraves*, 323 F. Supp. 1155 (D. Mass. 1971) (pregnant, unwed students).

³ The school board in *Cohen* candidly used the phrase "termination of employment." The regulation in *La Fleur* characterizes as "maternity leave" provision for dismissal from teaching at the beginning of the fifth month, enforced absence without pay until the first semester following the birth of the baby, and thereafter a rehiring preference, but no guaranteed right to return.

other temporary physical conditions discriminate invidiously on the basis of sex. The following expressions indicate the view now dominant in the lower courts:

Male teachers are not subject to pregnancy, but they are subject to many types of illnesses and disabilities. This record indicates clearly that pregnant women teachers have been singled out for unconstitutionally unequal restrictions upon their employment. *La Fleur v. Cleveland Board of Education*, 465 F.2d at 1188.

The heart of plaintiff's case is that disqualifying a physically capable woman from working because of a condition related solely to her sex is unconstitutionally discriminatory. Plaintiff admits the obvious, that men do not become pregnant, but points out that men, being human, are also subject to crises of the body, some of which, like childbirth, give ample warning: A cataract operation or a prostatectomy, for example, may be planned months ahead. Because male teachers are not forced by defendant Board to take premature leave because of a known forthcoming medical problem, female teachers should not be treated differently. Thus stated, the argument is persuasive, even compelling. One realizes with a shock what so many women now proclaim: Old accepted rules and customs often discriminate against women in ways that have long been taken for granted or have gone unnoticed. *Green v. Waterford Board of Education*, 473 F.2d at 634.

Male teachers, who might well be temporarily disabled from a multitude of illnesses, have not and will not be so harshly treated. In short . . . pregnant women are singled out and placed in a class to their disadvantage. They are discharged from their employment on the

basis of a physical condition peculiar to their sex. This is sex discrimination pure and simple. *Cerra v. East Stroudsburg Area School District*, 450 Pa. at 213, 299 A.2d at 280.

... Section 6(F) of Article 95A of the Maryland Annotated Code, which disqualifies all women from unemployment compensation who are five months or more pregnant, is unreasonable, arbitrary, and capricious. Its effect is to cast all females who become pregnant into a class without regard to the individual physical condition, health, ability to or availability for work. As such, it is an invidious discrimination based on sex resulting in a deprivation of rights and a denial of equal protection of the laws under the Fourteenth Amendment. *Orner v. Board of Appeals*, Superior Court of Baltimore City, Case No. 132,572, July 28, 1972.

Accord, Jordan v. Fusari, — F. Supp. — (D. Conn. June 25, 1973) (unemployment compensation); *Aiello v. Hansen*, — F. Supp. — (N.D. Calif. May 31, 1973) (disability insurance); *Pocklington v. Duval County School Board*, 345 F. Supp. 163 (M.D. Fla. 1972); *Williams v. San Francisco Unified School District*, 340 F. Supp. 438 (N.D. Calif. 1972); *Heath v. Westerville Board of Education*, 345 F. Supp. 501 (S.D. Ohio 1972); *Monell v. Dept. of Social Services*, 4 E.P.D. 5936 (S.D.N.Y. 1972); *Doe v. Osteopathic Hospital*, 333 F. Supp. 1357 (D. Kan. 1971) (Title VII decision); see *Jinks v. Mays*, 332 F. Supp. 254 (N.D. Ga. 1971), *aff'd in part and remanded in part*, 464 F.2d 1223 (5th Cir. 1972); *Robinson v. Rand*, 340 F. Supp. 37 (D. Colo. 1972) (concluding that a pregnancy discharge regulation violated due process); *Ordway v. Har-*

graves, 323 F. Supp. 1155 (D. Mass. 1971); cf. *Bravo v. Board of Education*, 345 F. Supp. 155 (N.D. Ill. 1972).

In sum, an impressive array of decisional authority⁴ defines as sex discrimination proscribed by the equal protection clause of the fourteenth amendment state and municipal regulations that classify pregnancy as a singular disability and attach to it consequences more burdensome than those applicable to other physical conditions.

Contrast with what every woman and most men know, the myopic vision of the majority of the court below in *Cohen*. Observing that "only women experience pregnancy and motherhood," the majority concluded that this fact "removes all possibility of competition between the sexes in this area." *Cohen v. Chesterfield County School Board*, 474 F.2d 395, 397 (4th Cir. 1973). No competition between men and women to become pregnant? Undeniably so. But that is not the competition at issue here. Whatever natural burdens carrying a fetus till term may entail, it is difficult to understand the logic that impels men to add artificial weight to the load. But that is precisely what the *Cohen* majority approved: a regulation erecting a man-made barrier against women in an area in which they most certainly do compete with men: employment.⁵ The *Cohen* decision

⁴ The catalogue of decisions cited here is representative, but far from exhaustive.

⁵ A Fourth Circuit bench differently composed recognized the vital importance to today's young women of equal opportunity to compete in all areas of employment. *Eslinger v. Thomas*, 476 F.2d 225, 232 (4th Cir. 1973): "Adult females . . . are no longer chattels of their husbands or parents. If they are tendered and accept special protection or special courtesies, there is no violation of right; but unwelcome special protection, especially denial of employment opportunity, foisted upon them is counter to modern law and modern social thinking."

that pregnancy disables no man, and is therefore subject to disadvantaged treatment in comparison to other disabilities functionally indistinguishable for employment-related purposes⁴ represents the view of a dwindling minority.⁵ It reflects astonishing disregard for developing national policy as reflected in legislative, executive and administrative, as well as judicial pronouncements.

B. Legislative, executive and administrative pronouncements.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, establishes as a national priority elimination of employment discrimination on the basis of race, color, religion, sex

⁴ As to the assertion that pregnancy is appropriately set apart because it is "voluntary" (see *Cohen v. Chesterfield County School Board*, 474 F.2d at 398; Brief for Petitioner in *Cleveland Board of Education v. La Fleur* at 24), compare *Buckley v. Coyle Public School System*, 476 F.2d at 95: "The fact, if it be a fact, that pregnancy is a voluntary status really has nothing to do with the question. The point is that the regulation penalizes the feminine school teacher for being a woman and, therefore, it must be condemned on that ground."

Given the current state of the art, the more effective contraceptives entail serious health risks for women. Under the circumstances, a certain insensitivity accompanies characterization of pregnancy as a strictly voluntary affair. See Segal & Tietze, *Contraceptive Technology: Current and Prospective Methods in Reports on Population/Family Planning*, Report No. 1 (July 1971 ed.); Tietze, *Effectiveness of Contraceptive Methods in Control of Human Fertility: Proceedings of the Fifteenth Nobel Symposium* (E. Diczfalusy & U. Borel ed. 1971).

⁵ In fact, the federal minority has dwindled to *Schattman v. Texas Employment Commission*, 459 F.2d 32 (5th Cir. 1972) (2-1 decision), *cert. denied*, 93 S. Ct. 901 (1973), a weak prop since the principal issue there decided was that prior to 1972 amendment, Title VII did not cover the in-house hiring of a state employment agency. *Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971), has been remanded to determine whether the judgment should be vacated for mootness, 41 U.S.L.W. 3346 (U.S. Dec. 19, 1972). *Gutierrez v. Laird*, 346 F. Supp. 289 (D.D.C. 1972), was vacated as moot after the Air Force waived its pregnancy discharge regulation. D.C. Cir. Feb. 6, 1973, as amended May 8, 1973.

or national origin. Acting under the authority of the commerce clause of the Constitution, Congress extended to the area of private employment guarantees of nondiscriminatory treatment secured in the public sphere by constitutional guarantees of due process and equal protection.* In 1972, Title VII was amended to further promote equal employment opportunities by extending coverage to state and municipal employees and specifying procedures to effectuate the policy of nondiscrimination in federal government employment. Public Law 92-621, 86 Stat. 103, March 24, 1972. The Equal Employment Opportunity Commission, the federal agency charged with administration of Title VII, has issued Sex Discrimination Guidelines implementing the congressional mandate that individuals be considered on the basis of individual capacities and not on the basis of characteristics typically attributed to their sex or to a defined portion of their sex. These Sex Discrimination Guidelines state explicitly that disadvantaged treatment of pregnant women is sex discrimination.⁹ They stipulate that a policy "which excludes from employment . . . employees

* See *Walker v. Kleindienst*, 357 F. Supp. 749 (D.D.C. 1973) (extension of Title VII to public employees provided a new remedy, but the right to nondiscriminatory treatment inheres in the Constitution).

⁹ 29 CFR 1604.10. This guideline reflects the studies and recommendations of the Citizens' Advisory Council on the Status of Women. See Koontz, *Childbirth and Child Rearing Leave: Job-Related Benefits*, 17 N.Y.L.F. 480 (1971); Comment, *Love's Labors Lost: New Conceptions of Maternity Leaves*, 7 Harv. Civ. Rights—Civ. Lib. L. Rev. 260 (1972). See also Office of Federal Contract Compliance Sex Discrimination Guidelines, 41 CFR 60-20 (applicable to employers performing federal contracts): "Women shall not be penalized in their conditions of employment because they require time away from work because of childbearing." 41 CFR 60-20.3(g); Department of Health, Education and Welfare Higher Education Guidelines 12-13 (October 1972) (prohibiting discrimination against pregnant women).

because of pregnancy is in prima facie violation of Title VII,"¹⁰ and that "disabilities caused . . . by pregnancy . . . are, for all job-related purposes, temporary disabilities" that may not be singled out for restrictive treatment.

State agencies administering state fair employment practice laws have adopted similarly explicit guidelines. For example, the Washington State Human Rights Commission has declared: "It is an unfair practice to discharge a woman or penalize her in terms and conditions of employment because she requires time away from work for childbearing."¹¹ Similarly, the New York State Division of Human Rights has ruled that requiring teachers to take a leave of absence after the fourth month of pregnancy and to remain on leave until at least six months after the birth of the child constitutes sex discrimination. The Division order requires that pregnant teachers be allowed to work before and after pregnancy as long as the attending physician

¹⁰ For an illustrative case, see *Doe v. Osteopathic Hospital*, 333 F. Supp. 1357 (D. Kan. 1971).

¹¹ Washington State Human Rights Commission, New Employment Regulations: Maternity Leave Policy, WAC 162-30-020(2), adopted June 22, 1972, effective July 26, 1972. Compare Minnesota Department of Human Rights Guidelines which read in part as follows:

c. an employer shall not maintain a policy for the termination of the employment of pregnant females which is based solely on pregnancy, or on a specific number of months of pregnancy. Such policy shall be based upon individual capacities, or characteristics, ability to perform specific duties of employment, efficiency, personal medical safety, or willingness to continue work . . . (effective June 22, 1971).

For other examples, see Illinois Sex Discrimination Guidelines effective Nov. 3, 1971, CCH Emp. Practices Guide ¶22,497.10; Maryland Sex Discrimination Guidelines, July 11, 1972, CCH Emp. Practices Guide ¶23,820.08; Pennsylvania Sex Discrimination Guidelines, as amended, Dec. 25, 1971, CCH Emp. Practices Guide, ¶27,296.02; Industrial Commission of Wisconsin (rules and practice implementing State Fair Employment Act §111.31-37).

approves. *State Division of Human Rights v. Board of Education of Union Free School District #22*, Case Nos. CS-21025-70 *et seq.* (June 29, 1971).¹²

In light of the sex discrimination definitions now guiding employers in the private as well as the public sector, Judge Haynsworth's conclusion in *Cohen* that the contested regulation does not apply to women in an area in which they compete with men, and was therefore non-discriminatory, is untenable. Rather, as the dissenting judges in *Cohen* recognized, the "inescapable truth" is that "female employees are the only employees . . . who become pregnant; it follows that they are provisionally dismissed from work on account of their sex."¹³

¹² See also *Staten v. East Hartford Board of Education*, Case No. F.E.P.-6-34-1, CCH Emp. Practices Guide ¶5055 (Mar. 28, 1972); *Cooley v. Board of Education, Waterford Union High School*, 1 Equal Rights Decisions of the Department 26, CCH Emp. Practices Guide ¶5079 (Dec. 6, 1971).

Recent activity has also centered on removal of barriers to receipt of unemployment compensation by pregnant and post-partum women. See, e.g., Michigan Attorney General's Opinion, February 18, 1972: The rules governing eligibility for unemployment insurance benefits that deprive a pregnant woman of eligibility to receive benefits during the period that begins with the tenth calendar week before expected confinement and extends through the sixth calendar week following termination of pregnancy are invalid because they discriminate against females on the basis of a physical condition unique to that sex and are in violation of the equal protection clause of the Federal Constitution.

For unemployment compensation modifications in other states see Connecticut §31-236(5), repealed by P.A. 140, L. 1973, effective October 1, 1973; Delaware §3315(9), as amended by Ch. 518, L. 1972; Illinois, §500, c. 4, as amended by P.A. 77-1809, L. 1972; Maine §1192.3 as amended by ch. 538 L. 1971; Oregon, §657.160(2), as amended by ch. 75, L. 1969.

¹³ 474 F.2d at 401. As more spectacularly expressed in Judge Duniway's dissenting opinion in *Struck v. Secretary of Defense*, 460 F.2d at 1379, if involuntary discharge of a woman solely on the ground of her pregnancy is not sex discrimination, nothing is!

II.

Regulations that force a woman out of employment at a fixed stage of pregnancy operate as "built-in headwinds" that drastically curtail women's opportunities.

Heading the list of arbitrary barriers that have plagued women seeking equal opportunity is disadvantaged treatment based on their unique child-bearing function. See *Love's Labors Lost: New Conceptions of Maternity Leaves*, 7 Harv. Civ. Rights—Civ. Lib. L. Rev. 260 (1972); Note, *Pregnancy Discharges in the Military: The Air Force Experience*, 86 Harv. L. Rev. 568 (1973). This reality has been obscured by the historical tendency of legislators to label sex discriminatory legislation "protective," and of jurists to regard any discrimination in the treatment of women as "benignly in their favor."¹⁴ Summary dismissal or forced, unpaid leave for pregnant women, still widespread and until very recently the common pattern,¹⁵ continues to be rationalized as "protective," although the object of the protection is less than apparent.¹⁶ In fact, such prac-

¹⁴ Cf. 1 Blackstone's Commentaries on the Laws of England 445 (3d ed. 1768) ("[E]ven the disabilities which the wife lies under are for the most part intended for her protection and benefit: so great a favourite is the female sex of the laws of England.").

¹⁵ See Address by Jacqueline G. Gutwillig, Chairman of the Citizens' Advisory Council on the Status of Women, at the Conference of the Interstate Association of Commissions on the Status of Women, in St. Louis, June 19, 1971; Koontz, *Childbirth and Child Rearing Leave: Job-Related Benefits*, 17 N.Y.L.F. 480 (1971).

¹⁶ Compare *La Fleur v. Cleveland Board of Education*, 326 F. Supp. 1208 (N.D. Ohio, 1971), *reversed*, 465 F.2d 1184 (6th Cir. 1972) (district court reasoned that the right to education is "fundamental," hence children must be spared exposure to visibly pregnant teachers), with Brief for Petitioner, *Cleveland Board of Education*

tices operate as "built-in headwinds"¹⁷ that drastically curtail women's opportunities.

Unquestionably, many women are capable of working effectively during pregnancy and require only a brief period of absence immediately before and after childbirth. See *Love's Labors Lost: New Conceptions of Maternity Leaves*, *supra*, 7 Harv. Civ. Rights—Civ. Lib. L. Rev. at 262 n. 11; Curran, *Equal Protection of the Law; Pregnant School Teachers*, 285 N. England J. Med. 336 (1971).¹⁸

v. *La Fleur* at 15 (education is not fundamental hence teachers have no right to protection from employment termination for pregnancy).

¹⁷ *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (impact of testing on blacks).

The effect of mandatory termination for pregnancy regulations was carefully assessed in *Heath v. Westerville Board of Education*, *supra*. Citing A. Montagu, *The Natural Superiority of Women* 16-17 (rev. ed. 1970), the court noted that "other societies have totally different responses to the fact of pregnancy and consider it a far less debilitating condition than does American society." The court then observed that "the very solicitous treatment of pregnancy, including the requirement that the new mother not return to her job for one year following delivery is more a manifestation of cultural sex role conditioning than a response to medical fact and necessity. The fact that [the plaintiff] does not fit neatly into the stereotyped vision . . . of the 'correct' female response to pregnancy should not redound to her economic or professional detriment." 345 F. Supp. at 505 n. 1.

¹⁸ See Testimony of Andre E. Hellegers, Professor of Obstetrics-Gynecology, Professor of Physiology-Biophysics and Director of Population Research at Georgetown University, before the Federal Communications Commission, December 1, 1971. In the Matter of Petitions filed by the Equal Employment Opportunity Commission, *et al.*, Docket No. 19143: "It is of some significance that women doctors and nurses, who are working on the obstetrical and other services at the hospital, often continue working right up to the day of delivery. This of course would not be so if the medical profession thought that working in pregnancy was contra-indicated."

Regulations that disregard this reality and "protect" all women who are pregnant, that is, deny them the opportunity to work without regard to individual circumstances, have in practice deprived working women of the protection they most need: protection of their right to work to support themselves and, in many cases, their families as well. Moreover, a mandatory "leave" or termination policy insures that a woman will not be "an equal competitor with her brother,"¹⁹ for it deprives her of opportunity for training and work experience during pregnancy and, in many cases, for a prolonged period thereafter.

For a large segment of the female labor force, gainful employment is dictated by economic necessity.²⁰ Earnings for this group are hardly "pin money"; their jobs are often the sole source of income for themselves and, in many cases, their dependent children. Even where husbands are present and employed, the wife's earnings frequently are necessary to keep the family above a bare subsistence level. Involuntary termination of employment for pregnancy, attended by loss of income and fringe bene-

¹⁹ *Muller v. Oregon*, 208 U.S. 412, 422 (1908).

²⁰ Approximately 33 million women are in the labor force today. The majority of them do not have the option of working solely for personal fulfillment. Most of the 7.2 million single women workers worked to support themselves or others. Nearly all of the 6 million women workers who were widowed, divorced, or separated from their husbands—particularly the women who were also raising children—were working for compelling economic reasons. The 4.2 million married women workers whose husbands had incomes of less than \$5,000 in 1970 almost certainly worked because of economic need. The same is probably true of the 3.2 million women whose husbands had incomes between \$5,000 and \$7,000. Figures taken from *Why Women Work*, Women's Bureau, Employment Standards Administration, U.S. Department of Labor (July 1972).

fits,²¹ and frequently denial of the right to return to work immediately after childbirth disables these women far more than their temporary physical condition.²²

For the more fortunate woman, for whom work is not dictated by economic necessity, mandatory pregnancy "leave" reinforces societal pressure to relinquish career aspirations for a hearth-centered existence. Loss of her job and often accumulated benefits profoundly affect the choices open to her.²³ If her right to return is not guaran-

²¹ For example, a teacher forced out of school due to pregnancy may lose health insurance benefits at a time when she cannot obtain new insurance, even assuming her resources would permit her to pay the premium. Despite her doctor's certification that she is able to work, unemployment compensation may be denied to her, and if she does become disabled, disability insurance may not be available to ease her plight.

²² See Testimony of Andre E. Hellegers, *supra*: "In the only large-scale analysis of work in pregnancy, involving close to four million women, women without incomes had a poorer outcome of pregnancy than women with incomes." [The study to which Dr. Hellegers referred is A. W. Diddle, *Gravid Women at Work, Fetal and Maternal Morbidity, Employment Policy, and Medicolegal Aspects*, 2 *Journal of Occupational Medicine* 10-15 (1970).]

See also Carey, *Pregnancy Without Penalty*, publication forthcoming in 1 *Civil Liberties Review* (Fall, 1973).

²³ Typical examples appear in the records of cases in which women litigated up to this Court what seemed to them a matter of plain injustice. Captain Susan R. Struck was subjected to over two years of repeated 24-hour discharge notices until, on the eve of this Court's review, the Air Force abandoned the contest. *Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971), *cert. granted*, 409 U.S. 947 (1972), *remanded for consideration of mootness*, 41 U.S.L.W. 3346 (U.S. Dec. 19, 1972). Mary Ellen Schattman, forced to leave her job as a market analyst at seven months, sought but was unable to find other employment prior to the birth. She was offered a job by the same employer after the birth, but in another city. Because she was then the family's principal breadwinner, her husband moved with her, disrupting his legal studies at Austin. *Schattman v. Texas Employment Commission*, 459 F.2d 32 (5th Cir. 1972), *cert. denied*, 93 S. Ct. 901 (1973).

teed, she is apt to encounter discrimination in locating new employment, this time because she is a mother.²⁴ If she defers return to the labor force for an extended period, her skills will have grown rusty and, upon attempted re-entry, she will face a further barrier: this time her age as well as her sex and limited work experience will count against her.²⁵

III.

School board regulations mandating involuntary termination of a teacher's employment at a fixed stage of pregnancy are inconsistent with the equal protection clause of the fourteenth amendment.

In determining whether governmental action at the federal, state or local level violates the equal protection principle, courts have applied standards of review ranging from lenient to stringent. *See* Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065 (1969). Two standards are generally contrasted: (1) the lenient or "reasonable relationship" test; (2) the "strict scrutiny" test met only by demonstration of a "compelling state interest," applicable when the action invokes a "suspect" criterion or impinges upon a "fundamental right." In recent commentary and judicial opinion jurists have noted

²⁴ *See Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). In these days of teacher surplus her new employment opportunity is further diminished. Significantly, in *Buckley v. Coyle Public School System*, 476 F.2d 92 (10th Cir. 1973), it was alleged that the termination for pregnancy rule operated with particular severity on black teachers.

²⁵ "When her youngest child enters school today's mother has 40 years of life yet ahead." California Women, Report of the Advisory Committee on the Status of Women 5 (1971).

the emergence of "an 'intermediate approach' between rational basis and compelling interest as a test of validity under the equal protection clause," *Eslinger v. Thomas*, 476 F.2d 225, 231 (4th Cir. 1973). This approach focuses on the substance of the governmental interest sought to be served and calls for assessment of the reasonableness of the means by which the regulation in question attempts to advance the identified interest. See Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972); *Boraas v. Village of Belle Terre*, 476 F.2d 806 (2d Cir. 1973).

With respect to the applicable standard of review in the instant cases, the position of *amici* is three-fold: (1) the regulations mandating termination of a school teacher's employment at a fixed stage of pregnancy, without regard to her preference and her physician's certification of her ability to continue teaching, establish a suspect classification for which no compelling justification exists; (2) the regulations impinge upon the exercise of a fundamental right and must therefore be subjected to close scrutiny; (3) the classification made in the regulations jeopardizes women's access to equal employment opportunity without promoting any substantial state interest.

A. *The challenged regulations establish a suspect classification.*

With some notable exceptions, until the current decade, the review standard for equal protection challenges to legislation according different treatment to women and men was deferential in the extreme. No line drawn between the sexes, however sharp, failed to survive constitutional assault. Gross generalizations concerning woman's

place in man's world were routinely accepted as sufficient to justify discriminatory treatment. See, e.g., *Hoyt v. Florida*, 368 U.S. 57 (1961); *Goesaert v. Cleary*, 335 U.S. 464 (1948); Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U. L. Rev. 675 (1971).²⁶

In 1971, revaluation of the impact of sex lines in the law was signalled by this Court's decision in *Reed v. Reed*, 404 U.S. 71. *Reed* invalidated an Idaho statute that gave a preference to men over women for appointment as estate administrators. Explicitly repudiating one-eyed sex role thinking as a predicate for governmental distinctions, the *Reed* opinion declared

[the statute] provides that different treatment be accorded to the applicants on the basis of their sex: it thus establishes a classification subject to scrutiny under the Equal Protection Clause. 404 U.S. at 75.

Recognizing that the governmental interest urged to support the Idaho statute was "not without some legitimacy,"

²⁶ Cleveland School Board's reliance on *Goesaert* and *Hoyt*, see Brief for Petitioners at 31-32, and recent judicial citation of the holdings of those cases as authoritative, e.g., *State v. Sinclair*, 258 La. 84, 245 So.2d 365 (1971); *State v. Enloe*, No. 52,424 (Louisiana Supreme Court March 26, 1973) (service on juries by women may be restricted to volunteers), evidence the need for explicit overruling by this Court. *Goesaert* has become an embarrassment to enlightened courts and has been politely but firmly discarded by them. E.g., *Sail'er Inn Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529 (1971); *Paterson Tavern & Grill Owners Ass'n v. Borough of Hawthorne*, 57 N.J. 180, 270 A.2d 628 (1970). *Hoyt* has inspired extravagant descriptions of the frivolity of women, *De Kosenko v. Brandt*, 63 Misc.2d 895, 898, 313 N.Y.S.2d 827, 830 (Sup. Ct. 1970). Moreover, it is responsible for perpetuation of a system that in practice results in the virtual exclusion of women from lay participation in the administration of justice. See *State v. Daniels*, 262 La. 475, 491, 263 So.2d 859, 864 (1972) (dissenting opinion).

404 U.S. at 76, the Court nonetheless found the legislation constitutionally infirm because it provided "dissimilar treatment for men and women who are . . . similarly situated." 404 U.S. at 77.

Reed was assessed by courts and commentators as a harbinger of fundamental change in the Court's perspective with regard to sex-based classifications.²⁷ It was apparent that the Court had departed significantly from the "traditional" approach to regulation that set women apart for special treatment.²⁸ Sex-based distinctions were to be subject to "scrutiny," a word until *Reed* typically reserved for race discrimination cases. Surely *Reed* did not apply the "traditional" standard that mandated tolerance of a legislative classification "if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*,

²⁷ See *Brenden v. Independent School District*, 41 U.S.L.W. 2590 (8th Cir. April 18, 1973); *Eslinger v. Thomas*, 476 F.2d 225 (4th Cir. 1973); *Green v. Waterford Board of Education*, 473 F.2d 629 (2d Cir. 1973); *Moritz v. Commissioner*, 469 F.2d 466 (10th Cir. 1972), cert. denied, 41 U.S.L.W. 3616 (U.S. May 22, 1973); *Lamb v. Brown*, 456 F.2d 18 (10th Cir. 1972); *La Fleur v. Cleveland Board of Education*, 465 F.2d 1185 (6th Cir. 1972); *Williams v. San Francisco Unified School District*, 340 F. Supp. 438 (N.D. Calif. 1972); *Heath v. Westerville Board of Education*, 345 F. Supp. 501 (S.D. Ohio 1972); *Robinson v. Rand*, 340 F. Supp. 37 (D. Colo. 1972); *Bray v. Lee*, 337 F. Supp. 934 (D. Mass. 1972); *Shull v. Columbus Municipal Separate School District*, 338 F. Supp. 1376 (N.D. Miss. 1972); *Reed v. Nebraska School Activities Ass'n*, 341 F. Supp. 258 (D. Neb. 1972); *Matter of Patricia A.*, 31 N.Y.3d 83, 335 N.Y.S.2d 33 (1972).

See Gunther, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 34 (1972); Note, 86 Harv. L. Rev. 568, 583-88 (1973).

²⁸ Responsive to the even-handed treatment mandated by this Court in *Reed*, on March 28, 1973, the probate court in Boise, Idaho appointed Sally Reed and Cecil Reed co-administrators of the estate of Richard Lynn Reed.

366 U.S. 420, 426 (1961). For the Idaho Supreme Court, and this Court as well, conceived such facts.

The direction first charted in *Reed* was confirmed by this Court's judgment in *Frontiero v. Richardson*, 93 S. Ct. 1764 (1973), which declared inconsistent with equal protection a fringe benefit scheme that awarded male members of the military housing allowance and medical care for their wives, regardless of dependency, but authorized benefits for female members of the military only if they in fact supported their husbands. While *Reed* involved an obsolete statute repealed, although not with retroactive effect, even before this Court heard the case, the differential involved in *Frontiero* reflected a pervasive legislative pattern. For dozens of examples on the federal level, see *Petition for Certiorari*, Appendix E, *Commissioner of Internal Revenue v. Moritz*, No. 72-1298 (March 22, 1973).²⁹ Despite the obvious significance of rejection of a common statutory classification, this Court was unwilling to perpetuate approval of lump treatment of men and women.

The plurality opinion in *Frontiero* declares that "classifications based upon sex, like classifications based on race, alienage or national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny." 93 S. Ct. at 1771. Justice Stewart, concurring in the judgment, regarded the distinction drawn by the statutes involved in *Frontiero* as "invidious," and eight members of this Court

²⁹ Automatic qualification of wives as dependent, whether or not they are in fact, but requirement of proof of actual dependency of husbands is the scheme of the Social Security Act and of many state and federal employment benefit programs. See, e.g., Bixby, *Women and Social Security in the United States*, DHEW Pub. No. (SSA) 73-11700 (1972).

rejected "administrative convenience" as justification for the sex line there at issue.

The regulations challenged here, exposed to the quality of judicial review required by *Frontiero*, must be rejected, for the notion that pregnancy enfeebles a capable healthy woman has been thoroughly discredited,³⁰ and forced confinement of women during pregnancy, once regarded as "protective," has been exposed as a prime example of class restriction that blunts individual opportunity.³¹

B. *The challenged regulations unreasonably condition the exercise of a right of fundamental constitutional dimension.*

To the public employee confronting an iron rule terminating her employment at a fixed stage of pregnancy, the law must appear as it did to Oliver Twist's Mr. Bumble. This Court's landmark decisions in *Roe v. Wade*, 93 S. Ct. 705 (1973), and *Doe v. Bolton*, 93 S. Ct. 739 (1973), recognize her constitutional right to terminate her pregnancy. If she chooses that course, she need not fear arbitrary dismissal. If she elects to bear her child, then without regard to the

³⁰ See A. Montagu, *The Natural Superiority of Women* 16-17 (rev. ed. 1970).

³¹ See pp. 18-22 *supra*. For comprehensive review of "benign" classifications ultimately harmful to women, see Brief for Petitioner, *Struck v. Secretary of Defense*, No. 72-178, at 38-47; Brief for American Civil Liberties Union, *Amicus Curiae, Frontiero v. Richardson*, No. 71-1694, at 34-44. In *Reed and Frontiero*, this Court demonstrated its understanding of the message sought to be conveyed by Judge Burnita Shelton Matthews, before her appointment to the federal bench, when she served as counsel to the National Women's Party. Decades ago, she called attention to the "defective vision" of men of the legal profession who regarded discrimination as "protection." Matthews, *Women Should Have Equal Rights With Men*, 12 A.B.A.J. 117, 120 (1926).

state of her health, she will be forced out of employment.³² But surely the Constitution does not abide choice of this quality. On the contrary, the decision in *Roe v. Wade* defines a right to determine, without undue state interference, "whether or not" to continue a pregnancy.³³ Since this right has been ranked by the Court as fundamental, a further basis for close scrutiny is present.

The plain implication of last term's landmark decisions cannot be undermined by the discredited argument that no one has a right to public employment. This point was made with appropriate dispatch by the Tenth Circuit in *Buckley v. Coyle Public School System*, 476 F.2d 92, 96-97 (1973).³⁴ Regulations that automatically terminate a teacher's employment at a fixed stage of pregnancy

invade [the teacher's] privacy by requiring her to choose between employment and pregnancy

. . . .

While it is true that [a teacher] does not have a constitutional right to continue public employment, it cannot be gainsaid that she does have a right to be free

³² The perspective of women faced with this choice is exemplified in Petition for Rehearing, *Schattman v. Texas Employment Commission*, No. 72-474, filed *pro se* by Ms. Schattman in February, 1973.

This Court's failure to face the issue of the rights of pregnant women has created a very real threat of economic blackmail. . . . Where abortion is legal, it is not unreasonable to expect both public and private employers to resort to this kind of pressure. It will be especially effective where the woman's threatened income is essential to her family's financial security. Petition, *supra*, at 4.

³³ 93 S. Ct. at 727.

³⁴ Accord, *La Fleur v. Cleveland Board of Education*, 465 F.2d at 1188; *Williams v. San Francisco Unified School District*, 340 F. Supp. at 443.

from the imposition of unconstitutional conditions in connection with that employment.

See generally Keyishian v. Board of Regents, 385 U.S. 589, 605-606 (1967); *Pickering v. Board of Education*, 391 U.S. 568 (1968); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).

The limits of reasonable regulation in this context are indicated in *Roe v. Wade* and *Doe v. Bolton*, *supra*. *Roe* recognized the validity of regulation tailored to preservation of a pregnant woman's health. That the regulations here at issue are not so tailored is apparent even from the testimony of Dr. William C. Weir, the medical expert upon whom the Cleveland Board of Education places greatest reliance. Dr. Weir testified that the middle trimester "is considered by far the safest time" for a woman who has chosen not to terminate her pregnancy. Appendix, *Cleveland Board of Education v. La Fleur* at 123a. *See also Heath v. Westerville Board of Education*, 345 F. Supp. 501, 505 (S.D. Ohio 1972) ("It appears that the first trimester of pregnancy (months 1-3), and not the second (months 4-6) are the most dangerous, in medical terms, to the expectant mother."). Yet that "safest time" is selected in Cleveland and Chesterfield County as the point at which the pregnant teacher must leave.

Doe v. Bolton is instructive on the kind of regulation that would reasonably relate to maternal health. This Court appraised as unreasonable Georgia's requirement that to terminate a pregnancy multiple medical opinions were required. By subjecting the opinion of the woman's physician to further review, Georgia exceeded the limits of reasonable regulation. Each of the teachers in the cases at bar

was certified by her physician to be in good health, and physically capable of working throughout pregnancy. Certification based on individual fitness is all that a regulation reasonably related to health may require. As Justice Douglas explained, "the right to seek advice on one's health and the right to place . . . reliance on the physician of [the individual's] choice are basic to fourteenth amendment values." *Roe v. Wade*, *supra*, 93 S. Ct. at 761. Totally inconsistent with fourteenth amendment values is the lump treatment accorded all pregnant women by the regulations here at issue.

Appallingly overbroad as health regulations, rules mandating termination of a school teacher's employment at a fixed stage of pregnancy in fact reflect the discredited notion that the visibly expectant mother should not be seen at work, but should be confined at home to await childbirth, and thereafter devote herself to childcare. Imposition of this outmoded standard upon women who prefer gainful employment to confinement encroaches upon their right to privacy in the conduct of their personal lives.³⁵ As recently affirmed in *Roe v. Wade*, "this right of privacy . . . is broad

³⁵ See, e.g., *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("also fundamental is the right to be free, except in very limited circumstances, from unwarranted governmental intrusions into one's privacy"); *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942) ("right to have offspring" recognized as a basic human right); *Union Pacific Ry. v. Botsford*, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person").

As to privacy in family life and with respect to marriage and parenthood, see *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Loving v. Virginia*, 388 U.S. 1, 12 (1967). See also, *Griswold v. Connecticut*, 381 U.S. 479 (1965), which underscored this Court's position on the funda-

enough to encompass a woman's decision whether or not to terminate her pregnancy."³⁶ But autonomy in deciding whether to bear a child is curtailed if job security is contingent on remaining childless.

Significantly, a male teacher encounters no governmental intrusion into the matter of his decision whether to beget a child. But the female teacher risks termination of her professional career unless she decides not to bear a child. The double standard³⁷ responsible for regulations that force pregnant women to relinquish gainful employment was discerned in *Robinson v. Rand*, 340 F. Supp. 37 (D. Colo. 1972), a decision declaring unconstitutional an Air Force regulation mandating the discharge of pregnant service-women. The court observed that "the accused Air Force regulation does operate discriminately, may well be based on outmoded stereotypes, and does force a woman to choose between important private rights and her career." 340 F. Supp. at 38. Balancing the vital personal interests at stake against the asserted interests of the military, the court concluded that any legitimate purpose of the Air Force could have been served by far less drastic means. In view of the special attributes of military service and the reluctance of courts to override military regulations,³⁸ the analysis in

mental right to personal privacy, and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), which made explicit the breadth of the underlying principle of *Griswold*: "If the right of privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U.S. at 453.

³⁶ 93 S. Ct. at 727.

³⁷ Cf. *Matter of Patricia A.*, 31 N.Y.2d 83, 335 N.Y.S.2d 33 (1972).

³⁸ See *Orloff v. Willoughby*, 345 U.S. 83 (1953).

Robinson has particular force. Even more telling is the swift adjustment made by the military to a system that permits pregnant women to continue pursuit of their service careers.³⁹

In sum, the regulations challenged by the school teachers in this litigation unreasonably condition their exercise of a right of fundamental constitutional dimension. Justified neither by logic nor by experience, the regulations arbitrarily inhibit a female teacher's aspirations for and access to an adult life in which work and family can be pursued in combination.

C. *The classification made in the challenged regulations does not advance a substantial governmental interest in a reasonable manner.*

Identifying as the "crucial question" whether involuntary termination of a school teacher's employment at a fixed stage of pregnancy "suitably" furthers "an appropriate governmental interest," the Second Circuit, in *Green v. Waterford Board of Education*, *supra*, concluded that the termination rule's "rigid classification" did not "sufficiently promote" any such interest. Similarly applying a standard of review less than "strict" but requiring a validating relationship more than "minimal," a three-judge court in *Aiello v. Hansen*, — F. Supp. — (N.D. Calif. May 31, 1973), declared exclusion of pregnancy from the state disability insurance program inconsistent with equal protection.⁴⁰

The familiar justifications for the inflexible termination rule were perceptively reviewed by the court in *Green*, as

³⁹ See Memorandum for the Respondents Suggesting Mootness, *Struck v. Secretary of Defense*, No. 72-178, filed December 1972.

⁴⁰ On the cost of full coverage for pregnancy in employment-related insurance programs, see Greenwald, *Maternity Leave Policy*, *New England Economic Review* 13 (Jan./Feb. 1973); Gutwillig,

they were by the court in *La Fleur* and the dissenting judges in *Cohen*. As to the purported concern for the health of the woman and unborn child, *Green* observes:

Why the Board should choose, by means of an inflexible rule, to manifest particular concern with the health of a pregnant woman, but not, for example, with the health of a teacher (male or female) recuperating from a heart attack is nowhere explained. In any event, we see little rationality in a rule that purports for reasons of health alone to treat all pregnancies alike rather than on a case-by-case basis. 473 F.2d at 634-635.

And in *Heath v. Westerville Board of Education*, 345 F. Supp. 501, 505 (S.D. Ohio 1972), the court indicated why women find this alleged concern particularly offensive:

[N]o two [pregnancies] are entirely identical. . . . While . . . some women are incapacitated by pregnancy . . . to say that this is true of all women is to define one half of our population in stereotypical terms and to deal with them artificially . . . Any rule by an employer that seeks to deal with all pregnant employees in an identical fashion is dehumanizing to the individual women involved and is by its very nature arbitrary and discriminatory.

The court in *Green* similarly discounted the challenged regulation's impact on continuity of instruction in the schools. While acknowledging that continuity of instruction is an important state interest, the court concluded

Job-Related Maternity Benefits, address delivered by the Chairman of the Citizens' Advisory Council on the Status of Women to the American Hospital Association Institute (July 27, 1972).

that the relationship between an arbitrary maternity "leave" rule and that interest was "insufficiently 'fair and substantial' to pass constitutional muster." Orderly transition is preserved when a teacher provides the school board with a certain date for commencement of her medical leave. 473 F.2d at 636. Indeed *Green*, *Cohen*, and *La Fleur* demonstrate that forced termination at a fixed stage of pregnancy in fact disserves the state interest in continuity of instruction. All of the teachers involved in these cases wished to teach until the end of the school term. Their physicians provided assurance of their fitness to do so. No individual assessment was made by the respective school boards of the teacher's ability to continue working. Instead, each was summarily dismissed when the term was in full swing. Only in Alice's world could it be urged that "continuity of education" was fostered by calling in substitutes to finish out the term.

As to "administrative convenience," mindful of the admonition in *Reed*, 404 U.S. at 76, and *Stanley v. Illinois*, 405 U.S. 645 (1972), subsequently underscored in *Frontiero*, *supra*, the *Green* court reasoned:

While it might be easier for the Board to handle all maternity leave problems on an arbitrary, blanket basis, a reduced administrative workload is constitutionally insufficient to sustain . . . discriminatory treatment of pregnant women. 473 F.2d at 636.

Accord, *Cerra v. East Stroudsburg Area School District*, *supra*, 450 Pa. at 213, 299 A.2d at 280; *Pocklington v. Duval County School Board*, 345 F. Supp. 163, 165 (M.D. Fla. 1972). Moreover, if anything in the law is perfectly clear, it is this Court's refusal to tolerate "convenience" as an excuse for conclusive presumption of unfitness or disquali-

fication. See *United States Department of Agriculture v. Murry*, 41 U.S.L.W. 5099 (U.S. June 25, 1973); *Vlandis v. Kline*, 41 U.S.L.W. 4796 (U.S. June 11, 1973).

While a visible pregnancy may have distracted jurists schooled in an earlier age,⁴¹ this most natural phenomenon hardly startles today's student population. Again *Green* gave the point the attention it merited:

We regard [the asserted interest in avoiding classroom distraction] as almost too trivial to mention. . . . Whatever may have been the reaction in Queen Victoria's time, pregnancy is no longer a dirty word. 473 F.2d at 635.

Finally, safety. The school board would spare the pregnant woman from accident and assault. Certainly these are risks. But it is ludicrous to suggest that a robust pregnant teacher of twenty-five is in need of insulation from these risks more than a fifty-five year old man or woman with ulcers, high blood pressure or a heart condition. See *Green v. Waterford Board of Education*, *supra*, 473 F.2d at 635.⁴²

In sum, the regulations challenged here rely on a sex-based stereotype no less invidious than one racial or religious; they establish a conclusive presumption which is factually unjustified and bears no reasonable and just relation to any permissible governmental objective. Because mandatory maternity "leave" provisions exclude from consideration the fitness of the individual, and treat pregnancy differently from any other physical condition occasioning a period of temporary disability, they deprive pregnant teachers of the equal protection of the laws.

⁴¹ See *La Fleur v. Cleveland Board of Education*, 326 F. Supp. 1208, 1210, 1213 (N.D. Ohio 1971), *reversed*, 465 F.2d 1184 (1972).

⁴² See also *Bravo v. Board of Education of Chicago*, 345 F. Supp. 155, 158 (N.D. Ill. 1972) (raising and rejecting the safety concern).

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals for the Fourth Circuit should be reversed, the decision of the Court of Appeals for the Sixth Circuit should be affirmed and school board regulations that require termination of the employment of teachers at a fixed stage in the pregnancy cycle should be declared unconstitutional.

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No. 72-777

CLEVELAND BOARD OF EDUCATION, *et al.*,
Petitioners,

v.

JO CAROL LA FLEUR, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

CITATIONS TO OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
QUESTIONS PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	3
A. Application of the Regulation	3
B. The Evidence Presented Establishes No Medical Purpose for Petitioner's Mandatory Maternity Rule	4
1. The Origins of the Mandatory Maternity Leave Rule Were Non-Medical in Nature	4
2. Both Parties' Expert Witnesses Agree that Pregnancy Requires Individualized Treatment and that No Medical Rule Requires All Women to Leave Work Prior to Child-birth	6
3. The Petitioners Do Not Contend that the Specific Provisions of their Present Mandatory Maternity Rules Are Medically Required	11
C. The Evidence Presented Establishes that No Educational Purpose Is Served by the Mandatory Maternity Rule	12
1. Far From Being Disruptive of the Classroom Environment, the Evidence Presented Establishes that a Teacher's Pregnancy May Be Conducive to Increased Rapport Between Teacher and Pupil	12
2. Continuity of Classroom Instruction is Often More Hindered than Helped by a Mandatory Maternity Leave Rule	13

II

D. Petitioners Admit That Their Administrative Requirements Would Be Met Merely by Requiring a Teacher to Give Adequate Advance Notice of Her Intention to Take Maternity Leave	15
---	----

SUMMARY OF ARGUMENT	16
---------------------------	----

ARGUMENT	18
----------------	----

I. To Require a Woman to Stop Teaching Solely Because She is Pregnant or Has Recently Become a Mother is to Discriminate Against Her on Account of Her Sex	18
--	----

II. The Equal Protection Clause of the Fourteenth Amendment Prohibits Restricting the Employment Rights of Women Who Give Birth When Similar Restrictions Have Not Been Placed Upon Employees With Other Temporary Medical Disabilities	24
---	----

A. The Standard of Review	27
---------------------------------	----

1. Petitioners' Mandatory Maternity Rule Must Be Subjected to Strict Judicial Scrutiny for Two Reasons, Either One of Which Alone Would Require Its Use	28
---	----

(a) The Maternity Regulation Creates a Classification Based on Sex and Now Must Be Considered Suspect	28
---	----

(i) <i>Muller</i> and <i>Goesaert</i> Are Now Outdated	29
--	----

(ii) The Time is Now Appropriate for this Court to Declare Sex Discrimination No Less Invidious than Other Types of Discrimination Not Declared to be Suspect	36
---	----

III

(b) The Mandatory Nature of the Rule Adversely Affects Respondents' Fundamental Right to Bear and Raise Children	41
2. The Strict Standard Applied: There is No Compelling Need for the Present Regulation in the Furtherance of Legitimate Governmental Objectives	46
B. The Mandatory Maternity Rule is Arbitrary and Capricious and So Must also Fail Under the More Lenient Standard of Review	48
1. The Regulation Appears to Have No Medical Objectives; The Evidence Supports Only One Substantive Objective: Keeping Pregnant Teachers Out of Sight	49
2. Irrebuttable Presumptions Embodied in the Maternity Rule Have Either Been Disproven or Are Irrelevant	51
3. Administrative Convenience Has Been Rejected By This Court as Legitimizing Otherwise Illegal Sex Discrimination	54
CONCLUSION	56

IV

TABLE OF AUTHORITIES

Cases

<i>Abbot v. Mines</i> , 411 F. 2d 353 (6th Cir. 1969)	50
<i>Adkins v. Children's Hospital</i> , 261 U.S. 525 (1923)	30, 31, 32
<i>Aiello v. Hansen</i> , F. Supp. , No. C 72-1402 SW Slip Opinion at p. 13 (N.D. Calif., May 31, 1973)	22, 49
<i>Allison v. Board of Education Union Free School District No. 22, Nassau</i> , 333 N.Y.S.2d 261 (1972)	23
<i>Awadallah v. New Milford Board of Education</i> , N.J. Dept. Law and Public Safety (Sept. 29, 1971)	23
<i>Blair v. New Milford Board of Education</i> , No. EO 2Es-5337 (Sup. Ct. Hackensack, N.J.) (Jan. 20, 1971)	23
<i>Boatright v. School District No. 6 of Arapahoe County</i> , 160 Colo. 163. 415 P.2d 340 (1966)	19
<i>Bradwell v. Illinois</i> , 83 U.S. 130 (1873)	37
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VI

<i>Mengelkoch v. Industrial Welfare Commission</i> , 442 F.2d 1119 (9th Cir. 1971)	32
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VII

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VIII

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Constitution

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Amendment XIV, §1	2, 26, 27, 33, 36, 38

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IX

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Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-777

CLEVELAND BOARD OF EDUCATION, et al.,
Petitioners,

v.

JO CAROL LA FLEUR, et al.,
Respondents.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT**

BRIEF FOR RESPONDENTS

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported in 465 F. 2d 1184 (6th Cir., 1972). That Court's order denying rehearing is not reported. The opinion of the District Court is reported in 326 F. Supp. 1208 (N. D. Ohio, 1971). The opinions of the District Court and the Court of Appeals, and the order denying rehearing are reproduced in the Appendix filed in this Court, June 21, 1973.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was rendered and filed on July 27,

1972. A motion for a rehearing and suggestion for a hearing *en banc* was denied on August 29, 1972. The Petition for a Writ of Certiorari was filed November 27, 1972, and granted April 23, 1973. The jurisdiction of this Court was invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved in U. S. CONST. amend. XIV. § 1: "... ; nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED FOR REVIEW

I

Does a regulation of the Cleveland Board of Education requiring a pregnant teacher to take at least an eight month leave of absence from her job, without pay, and regardless of her ability and desire to continue working, violate the Equal Protection Clause of the Fourteenth Amendment?

Respondents contend that the regulation is unconstitutional and that the judgment of the Court of Appeals so holding should be affirmed.

II

Is a classification including employed women who require time away from work for a temporary disability relating to childbirth, but excluding employees with other temporary disabilities, subject to strict judicial scrutiny?

Respondents contend that a classification based on sex is subject to strict judicial scrutiny, although its

arbitrary nature would also render it unconstitutional under the more lenient standard of review.

STATEMENT OF THE CASE

A. APPLICATION OF THE REGULATION

At the time of the filing of their complaints, Mrs. LaFleur and Mrs. Nelson had both been forced to leave their teaching positions in the Cleveland Public Schools pursuant to the mandatory maternity rule of the Cleveland Board of Education. Mrs. LaFleur was placed involuntarily on a maternity leave of absence on March 12,

The regulation provides:

"Any married teacher who becomes pregnant and who desires to return to the employ of the Board at a future date may be granted a maternity leave of absence without pay.

"APPLICATION. A maternity leave of absence shall be effective not less than *five (5) months before the expected date* of the normal birth of the child. Application for such leave shall be forwarded to the Superintendent at least *two (2) weeks before the effective date of the leave of absence*. A leave of absence without pay shall be granted by the Superintendent for a period not to exceed *two (2) years*.

"REASSIGNMENT. A teacher may return to service from maternity leave not earlier than the *beginning of the regular school semester which follows the child's age of three (3) months*. In unusual circumstances, exceptions to this requirement may be made by the Superintendent with the approval of the Board. Written request for return to service from maternity leave must reach the Superintendent at least six (6) weeks prior to the beginning of the semester when the teacher expects to resume teaching and shall be accompanied by a doctor's certificate stating the health and physical condition of the teacher. The Superintendent may require an additional physical examination.

"When a teacher qualifies to return from maternity leave, she shall have priority in reassignment to a vacancy for which she is qualified, under her certificate, but she shall not have prior claim to the exact position she held before the leave of absence became effective.

"A teacher's failure to follow the above rules for maternity leave of absence shall be construed as termination of contract or as grounds for dismissal." (Emphasis in original) (A. 39-40).

1971 (A. 41). Mrs. Nelson was terminated on March 26, 1971 (A. 42). The departure time selected by Petitioners for each teacher, in accordance with the mandatory maternity leave rule, was the date five months prior to the expected date of childbirth (A. 40, 42). Both teachers filed complaints asserting jurisdiction of the United States District Court under the Civil Rights Act of 1871, 42 U. S. C. § 1983, and 28 U. S. C. § 1343 (3) and (4), and their two cases were consolidated for hearing by the District Court.

Shortly prior to hearing, the Board of Education conceded that Mrs. Nelson would be placed on maternity leave. However, Petitioners continued to maintain that since her teaching contract would expire at the end of the 1971 academic year under the Board of Education's maternity leave policy, Mrs. Nelson would have no right to re-employment in the Cleveland Public Schools.

B. THE EVIDENCE PRESENTED ESTABLISHES NO MEDICAL PURPOSE FOR PETITIONER'S MANDATORY MATERNITY RULE

1. The Origins of the Mandatory Maternity Leave Rule Were Non-Medical in Nature

The mandatory maternity rule of the Cleveland Board of Education was promulgated at the instance of Dr. Mark C. Schinnerer, Superintendent of Schools both before and after the mandatory maternity rule was adopted. Dr. Schinnerer testified that prior to the early 1950's there had been no regulation with respect to maternity leave; while leave would be granted, it was not imposed (A. 172, 179). Although it was at Dr. Schinnerer's recommendation that a mandatory rule was adopted, at no time in his testimony did Dr. Schinnerer suggest that any medical purpose was served by its adoption. The problem apparently was that

doctors could not always be counted on to require their patients to stop teaching on the basis of their pregnancy alone (A. 181). Selection of the specific cut-off date prior to childbirth appears to have been chosen primarily for the sake of appearances. Dr. Schinnerer testified as to the basis of the required termination date: "Well, it was about a half way point and it was at that point when the physical appearance begins to change." (A. 176). Requiring a teacher to leave work once she "began to show" was also in keeping with Dr. Schinnerer's testimony that the rule had been adopted to save teachers the embarrassment of children giggling at their pregnant condition (A. 173).

That portion of the maternity rule relating to a preferential re-employment right after childbirth originally permitted a teacher to return from maternity leave only at the beginning of a semester following the age of six months of the child (A. 172). Again, the reason for prohibiting a teacher from returning to work soon after the birth of her child was based on non-medical considerations. Dr. Schinnerer testified that he had had a twofold reason for the return provision for restricting the time of return:

"One was so that it wouldn't be a second break. A second class wouldn't have the disruption of changing teachers in the middle of the semester. And the other was that I am a strong believer that young children ought to have the mother there. I think much of the difficulties we have in this country come from the fact that parents have neglected, and it is very important that they be there for the love and tender care of the babies. If that is a lecture" (A. 184).

No additional testimony was offered by any of Petitioners' witnesses to justify restricting a teacher's right to an early return to work after childbirth.

2. Both Parties' Expert Witnesses Agree that Pregnancy Requires Individualized Treatment and that No Medical Rule Requires All Women to Leave Work Prior to Childbirth

Three witnesses presented medical testimony in this case. Respondents called Dr. Sarah Marcus, President of Women's General Hospital in Cleveland and the Chief of its Department of Obstetrics and Gynecology, an obstetrician still delivering babies after forty-eight years of practice (A. 145, 162-163) and herself a mother (A. 148, 151-152). Dr. Verners Rutenbeigs, Mrs. Nelson's obstetrician also testified on behalf of the Respondents. Petitioners relied on Dr. William C. Weir, a physician who, since 1948, has been specializing in problems of infertility (A. 106-108).

These three medical experts were in general agreement that the effects of pregnancy, like other temporary medical disabilities, are individual in nature and should be treated as such. Dr. Marcus stressed the need for individualized treatment (A. 148). Dr. Weir agreed with respect to the individual nature of each pregnancy and the requirement of individualized prescription (A. 124).

There was no real dispute among the medical experts with respect to the usual characteristics of a normal pregnancy, nor with respect to possible complications of pregnancy. Headaches and nausea, including vomiting, were recognized as characteristic of the first three months of some normal pregnancies while spontaneous abortion was mentioned as a possible complication of this period of pregnancy (A. 95, 110, 152). The maternity rule of the Cleveland Board of Education permits pregnant teachers to carry on their regular teaching duties during this period of pregnancy.

No expert witness suggested that any characteristic of a normal pregnancy would impair a woman's ability to work during the third, fourth, or fifth month of her pregnancy. The Board of Education, however, does not allow its teachers to work past the end of the fourth month of pregnancy. Potential complications of this period of pregnancy were described by Petitioners' witnesses as prematurity, early forms of toxemia, and placenta previa (A. 111-112). Despite stressing the possible complications of pregnancy, Petitioners' expert testified that "the middle trimester is considered by far the safest time." This trimester was specifically described as being "12 weeks to 28 weeks of gestation" (A. 123); this "safest time" thus extends well beyond the teacher termination date required by the Board of Education's mandatory maternity rule.

All three experts testified that the last three months of a normal pregnancy are characterized by weight gain (A. 96, 113, 158). Petitioners' witness also claimed that other characteristics such as a shift in the center of gravity and an increase in appetite and in the frequency of urination (A. 113, 114) are prevalent during this period of pregnancy. Respondents' witness, Dr. Marcus, testified that her pregnant patients had never complained of any change of their centers of gravity (since, if there were such changes, they would adjust to them gradually), and that, absent a bladder infection, frequency of urination has never caused her pregnant patients any difficulties (A. 158-159). Respondents' witness, Dr. Rutenbeigs, denied that an increase in appetite is a necessary concomitant of this stage of pregnancy, testifying merely that different kinds of food than usual may be desired (A. 97). Petitioners' witness again described placenta previa, toxemia and premature labor as the possible complications of this period of pregnancy.

The medical experts also testified to the incidence of the possible complications of pregnancy, their foreseeability and care. Petitioners' witness testified that ten percent of all women are subject to toxemia (A. 111).² The experts agreed that toxemia occurs slowly and can be foreseen to a certain extent (A. 103, 111) even though, as Petitioners' expert testified, the causes of toxemia are unknown (A. 124). A patient with toxemia may be required simply to stay at home, or, bed rest, hospitalization, or termination of pregnancy may be prescribed (A. 104, 111, 153). Placenta previa occurs in less than one-half of one percent of pregnancies, according to Respondents' witness, Dr. Rutenbeigs (A.102), and in one percent to two percent of all pregnancies according to Petitioners' witness, Dr. Weir (A. 112). Dr. Weir also testified that placenta previa can be treated but not prevented (A.125).

The experts all agreed that, despite the possibility of complications, medical consensus does not require all pregnant women to stop work prior to childbirth. Dr. Rutenbeigs testified that, in his opinion, women can continue working during pregnancy (A. 93) and that he had advised Mrs. Nelson that she "could teach as long as she felt motivated to do so" (A. 91). In Dr. Marcus' opinion, some teachers can teach right up until childbirth. Indeed, she had worked during her own pregnancies virtually until the time of delivery (A. 148-149, 151). Dr. Jane Kessler, a child psychologist, testified that she had worked until two weeks before childbirth (A. 136-137), and Dr. Weir, Petitioners' expert, testified on cross-examination

² Although Petitioners claim that their own summation of published medical information demonstrates that Dr. Weir's testimony represents the consensus of medical expertise (Pet. Br. 8, n.2), Exhibit A to Petitioners' brief contends only that six to seven percent of pregnant women are subject to toxemia (Pet. Br. 41).

that he "generally allowed his patients to lead a relatively normal life"; so long as a pregnancy was normal his patients were permitted to make their own determinations within reason (A. 121).

Dr. Weir, Petitioners' own witness, further stated that:

"I have had patients that worked as secretaries throughout pregnancy, and I have seen nurses that worked in the hospital going to term and practically going from the nurse's station up to the delivery room" (A. 128).

The experts agreed not only that women may often work right up until the date of delivery, but also that normal physical activity can be carried on throughout pregnancy. Dr. Marcus testified that she advocates physical activity during pregnancy (so long as the pregnancy is normal, that is, without complication) and that climbing stairs or even farm labor is not harmful (A. 149, 156). Dr. Weir permits his pregnant patients to swim and to engage in reasonable physical activities (A. 121).

The only concern voiced by the experts with respect to physical activities was sudden, violent, physical exertion which could contribute to a premature separation of the placenta (A. 115, 159-160). Petitioners' expert admitted that a premature separation of the placenta could occur in a woman who is home caring for her children while pregnant, or could occur spontaneously (A. 125). Dr. Marcus noted that great physical exertion may be required of a nurse, such as lifting a patient who has fallen out of bed. The evidence of one of Petitioners' witnesses indicates that the only physical activity required of teachers in the course of their regular duties is that of standing (A. 212). Dr. Marcus testified that her hospital had no across-the-board rule requiring its nurses to

stop work at any specific time prior to childbirth and that she imagined that the hazards of the nursing profession were greater for a pregnant woman than those of teaching (A. 150-151).

Both Mrs. LaFleur and Mrs. Nelson testified to their continued ability to carry out their teaching duties during pregnancy (A. 48-50, 72-73). Mrs. Nelson testified that she had had no more disciplinary problems than normal as a teacher and that discipline became much easier during her pregnancy (A. 46-47). Mrs. LaFleur testified that she had had no disciplinary problems with her students (A. 66, 71), and indeed, had assisted a non-pregnant teacher with some of hers (A. 67, 77-78).

Petitioners' witnesses offered testimony relating to duties of a school teacher and the general environment of the public schools today. Petitioners sought to demonstrate that the situation in the schools was such that teachers must be fearful of their students and that their concerns relating to their environment would have an adverse consequence on their health.

The number of assaults on teachers, the number of accidents sustained by teachers, and the number of guns and knives confiscated from students in schools was introduced into evidence by one of Petitioners' witnesses over Respondents' objections (A. 192-193, 195) but this witness did not know whether the teachers assaulted were pregnant or not, nor did he know whether any teachers sustaining falls were pregnant (A. 202-203). Indeed, Petitioners at no time have claimed that any pregnant teacher has ever been injured or assaulted during the course of her duties while employed by the Cleveland Board of Education.

Petitioners' witness, Dr. Weir, testified that while women undergoing normal pregnancies are frequently

subject to worries (A. 114), there is no evidence yet to establish that worries can induce premature labor (A. 114-115), nor is it clear that the mental health of the mother can have an effect on her pregnancy. (A. 125-126). Although Petitioners' medical doctor, who was not qualified as a psychological expert, testified to the psychological effects of pregnancy upon women, Respondents' witness, Dr. Jane Kessler, a child psychologist and Director of the Mental Development Clinic of Case-Western Reserve University, was not permitted to testify to the psychological effects upon school children of being taught by a pregnant teacher (A. 135-136).

Petitioners, indeed, did not dispute Respondents' evidence that, whatever the environment of the Cleveland Schools, the Board of Education today allows pregnant students to ~~remain~~ in school throughout their pregnancies.³ Nor did Petitioners deny that the Board of Education will permit a teacher in an advanced stage of pregnancy to teach in its schools on a "volunteer"—i.e., unpaid—basis, after she has been required to leave her teaching position pursuant to the mandatory maternity rule.⁴

3. The Petitioners Do Not Contend that the Specific Provisions of their Present Mandatory Maternity Rules Are Medically Required

While Petitioners' witness, Dr. Weir, generally considered the mandatory maternity rule to be reasonable (A.

³ One of the school teachers testifying indicated that there had been pregnant school girls enrolled in the school in which she taught (A. 87), while one of the Respondents had taught seventh, eighth and ninth graders who were pregnant (A. 67).

⁴ See testimony of Kathryn Tucker, a teacher who taught in a Cleveland Public School on a volunteer basis from the end of her fifth month of pregnancy through her eighth month of pregnancy (A. 81-88).

118) on the basis of "the chance of injury and the increased worries" (A. 119), he admitted that "the exact time of four months, of course, is a little flexible" (A. 119). Attorneys for the Petitioners are even more specific. They state: "Whether the mandatory maternity leave should begin at the beginning of the fifth, or the sixth, or the seventh month of pregnancy is medically debatable" (Pet. Br. 20).

The Petitioners offered no evidence of any medical reason for that aspect of the maternity rule restricting a teacher's right to return to work.

C. THE EVIDENCE PRESENTED ESTABLISHES THAT NO EDUCATIONAL PURPOSE IS SERVED BY THE MANDATORY MATERNITY RULE

1. Far From Being Disruptive of the Classroom Environment, the Evidence Presented Establishes that a Teacher's Pregnancy May Be Conducive to Increased Rapport Between Teacher and Pupil

Both Mrs. LaFleur and Mrs. Tucker testified that they told their students of their pregnancies (A. 70-71, 86). Neither Mrs. LaFleur nor Mrs. Tucker experienced any giggling or snide remarks from students (A. 71, 86). Indeed, Mrs. LaFleur's students applauded when they heard the news (A. 70), and Mrs. LaFleur testified that her pregnancy brought her closer to the students: she talked with them about her pregnancy; some students told her that her study hall students planned to have a shower for her, and one of her students who had had a baby offered to bring her her maternity clothes (A. 70-72). Mrs. Tucker also testified to the favorable reactions of her students to her pregnancy (A. 86).

Only Dr. Schinnerer testified that pregnancy was dis-

ruptive of classroom order. Dr. Schinnerer, now 74 years old, retired from his position with the Cleveland Board of Education in 1961 (A. 167, 169). While he stated that the mandatory maternity rule had been adopted as a result of students' giggling embarrassing pregnant teachers and disrupting the classroom (A. 173), he could recall no particular instance of such disruption (A. 183). Dr. Schinnerer also testified that while pregnancy did not always result in the disruption of a classroom in the elementary school level, it "very nearly always" did so at the secondary level (A. 182). However, Mr. Tanczos, Supervisor of Secondary Education, in keeping with the testimony of both Mrs. LaFleur and Mrs. Tucker, testified that he had never received reports of students giggling either at pregnant teachers or at pregnant students (A. 203). Mr. Tanczos had been employed by the Cleveland Board of Education since 1950, and had been Supervisor of Secondary Education since 1961 (A. 191).

2. Continuity of Classroom Instruction is Often More Hindered than Helped by a Mandatory Maternity Leave Rule

While one of Petitioners' witnesses felt that the absence of a maternity rule would disrupt the educational process (A. 198-199), the evidence presented at hearing demonstrated the disruptive nature of the rule itself.

Mrs. LaFleur and Mrs. Nelson were both expecting their babies in mid-summer (A. 37, 38). Both Respondents were concerned that the enforcement of the maternity rule would cause unnecessary disruption in their students' educational programs. Mrs. Nelson asked to be permitted to continue teaching until April 8, 1971, the first day of spring vacation, so that her departure would be less

disruptive to the children (A. 33, 43, 51). On April 6, 1971, after this request had been denied and her resignation accepted, Mrs. Nelson sought to revoke her resignation (A. 36, 43). At hearing, she testified that she was prepared to return to school and believed that she could complete the semester (A. 53). Mrs. LaFleur testified that she "was greatly upset at being told she could not finish the year" (A. 68), and that she continued to report for work each day during the week following her required departure although she was not permitted to teach (A. 70).

Mrs. Nelson, a French teacher, was replaced by Marie Pocrant, a teacher who did her school training in Spanish (A. 54). Mrs. LaFleur was replaced by Rosemarie Sutter, a teacher intern (A. 41-42, 73). Testimony of one of Petitioners' witnesses, Dr. Schinnerer, established that when teachers left in the middle of a semester, the school would "generally just fill in with a substitute." When asked whether a pregnant teacher would ever have been continued past the cut-off time until a suitable replacement could be found, this witness answered: "No" (A. 184). Another of Petitioners' witnesses, Mr. Tanczos, testified that several teachers who had left positions had been replaced by students (A. 210-211).

Teacher turnover in Cleveland's inner-city schools averages between fifteen and twenty percent. This figure is higher than the turnover rate in suburban school systems or in city schools not in the inner-city (A. 214). Both Mrs. LaFleur and Mrs. Nelson taught students who had already had teachers leave earlier during the school year. Mrs. Nelson testified that her students "wanted to know how many teachers they were going to have before the end of the year" (A. 48). At Christmas time, 1970, when school authorities had already been advised of Mrs. LaFleur's pregnancy and had informed her that she would

not be permitted to teach through the end of the school year, the Board of Education changed Mrs. LaFleur's teaching assignment from that of ninth grade English to a seventh grade "Transition" class of underachievers (A. 41, 64, 68, 209-210). Mrs. LaFleur testified that her students were noticeably disappointed when they learned that she would have to leave (A.71).

D. PETITIONERS ADMIT THAT THEIR ADMINISTRATIVE REQUIREMENTS WOULD BE MET MERELY BY REQUIRING A TEACHER TO GIVE ADEQUATE ADVANCE NOTICE OF HER INTENTION TO TAKE MATERNITY LEAVE

Petitioners have stressed the administrative problems which would occur if the Board of Education had no mandatory maternity rule (Pet. Br. 11-12). However, teacher replacement upon short notice was the only administrative problem identified by Petitioners' witnesses (A. 198).

No notice of any kind is sought of a teacher who must leave school in the middle of the year due to a medical disability other than pregnancy (A. 206-207). In this situation a leave of absence will be arranged through personal contact or by talking to the doctor to see what he recommends (A. 180). Petitioners' witnesses were aware that the Board of Education could place a teacher on an unrequested—and involuntary—leave of absence in the event a teacher was unable to continue to carry out his teaching duties (A. 179-180, 206). This power apparently has never been used except to give a leave of absence to a person departing for military service who did not think to request one (A. 180).

Mr. Tanczos, Supervisor of Secondary Education, admitted on cross-examination that the problem of a lack

of uniformity in the amount of notice given by teachers taking maternity leave could be cured by a rule requiring adequate notice of the pregnant teacher's intention to leave (A. 206).

SUMMARY OF ARGUMENT

The Cleveland Board of Education has adopted a mandatory maternity rule placing its pregnant teachers in a special category to their disadvantage. By requiring pregnant women to take an unpaid leave of absence during the last five months of pregnancy and for at least three months thereafter, the Board of Education, acting on stereotypical notions of what a pregnant woman should or should not do, has discriminated against its female employees on the basis of their sex. Respondents allege that the proper standard of review under the equal protection clause here must be one of strictest scrutiny. Sex is as immutable a characteristic of birth as other classifications now held to be suspect and so also should be accorded such treatment. In addition, the mandatory nature of the regulation penalizes the fundamental right of women to bear children and so, for this reason alone, also requires application of the strictest standard standard of review. Under such a standard, the regulation necessarily must be invalid since less objectionable means are available to accomplish any legitimate purpose which the rule purports to serve.

Even if a more lenient test of equal protection were used to review the case, Respondents believe the mandatory maternity regulation must be invalid. The origins of the regulation reveal no more important objective served than insuring that students will not be taught by obviously pregnant teachers at whose condition they might giggle or

joke. Application of the present rule promotes classroom *discontinuity* since each Respondent otherwise could have continued teaching through the end of the school year. In addition, the regulation fails to serve any medical objective: All experts testifying agreed that medical authority today does not prohibit women whose pregnancies are without complication from engaging in normal physical activity.

The mandatory maternity rule, in addition to being aimed at an impermissible legislative goal, embodies certain irrebuttable presumptions which have either been disproven or are irrelevant. One presumption is that the pregnant teacher cannot perform her teaching duties; another is that her pregnancy is voluntarily incurred and for this reason more stringent treatment is justified than that accorded teachers with other medical disabilities.

Finally, administrative reasons do not require a mandatory leave rule. Testimony of one of Petitioners' witnesses establishes that the need is merely one of reasonable notice to insure timely teacher replacement. Furthermore, Petitioners' justification of administrative convenience is inconsistent with the established record in this case. Without a mandatory leave rule there would have been no need to replace either Respondent prior to the close of the academic year. Allegations of administrative convenience therefore are legally insufficient to save Petitioners' discriminatory rule.

ARGUMENT

I. TO REQUIRE A WOMAN TO STOP TEACHING SOLELY BECAUSE SHE IS PREGNANT OR HAS RECENTLY BECOME A MOTHER IS TO DISCRIMINATE AGAINST HER ON ACCOUNT OF HER SEX

Regulations seemingly neutral on their face, which single out members of only one sex for special treatment discriminate on the basis of sex. This has been well established by recent judicial authority in litigation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The Court of Appeals for the Seventh Circuit in considering whether or not an airline could refuse to employ married women as flight attendants, early pointed out: "[D]iscrimination is not to be tolerated under the guise of physical properties possessed by one sex." *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971). That some, rather than all, members of one sex are affected does not legitimize an otherwise discriminatory provision. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). In *Phillips* the Court considered a refusal to hire women with preschool age children. As Chief Judge Brown stated, dissenting from denial of a motion for rehearing *en banc*, in *Phillips*:

"Nobody—and this includes Judges, Solomonic or life tenured—has yet seen a male mother. A mother, to oversimplify the simplest biology, must then be a woman.

It is the fact of the person being a mother—i.e., a woman—not the age of the children, which denies employment opportunity to a woman which is open to a man." 416 F.2d 1247, 1259 (5th Cir. 1969).

These principles, already often considered by courts, both federal and state, are responsible for the growing body of case law and administrative rulings which hold that classifications which treat pregnancy differently from

other temporary medical disabilities discriminate against women on the basis of their sex.

To date court decisions have centered on two related disabilities imposed on pregnant women: (1) the common employer practice of terminating a pregnant employee or requiring her to take a leave of absence when she is medically able to work; and (2) the equally often encountered denial of unemployment compensation or disability insurance benefits to women who are able to work and seeking employment while pregnant. Often the same women are affected by both these practices, first being discharged by their employers for being pregnant, then being denied unemployment or disability compensation awards by the state.

Court decisions in federal and state courts have now rejected mandatory maternity leave regulations on a variety of grounds. In some instances these cases have been decided simply as contract cases under state law.⁵ In others, courts have decided that such employer practices discriminate against women on the basis of their sex and are unconstitutional.

Prior to the decision of the Court of Appeals for the Sixth Circuit below, the United States District Court for the Southern District of Ohio, ruling on a mandatory maternity leave case, refused to follow the precedent of the Northern District of Ohio in *LaFleur*. Judge Rubin, in deciding whether the maternity policy of the Westerville Board of Education discriminated against women, noted

⁵ See e. g., *Schlueter v. School District No. 42 of Madison County*, 168 Neb. 443, 96 N.W.2d 203 (1959), awarding a teacher discharged for pregnancy back pay for the five months remaining of her contract; *Boatright v. School District No. 6 of Arapahoe County*, 160 Colo. 163, 415 P.2d 340 (1966), upholding a Board of Education's refusal to permit a newly hired teacher to teach after learning that her child was less than a year old where the Board's maternity policy prohibited a teacher from returning to work until the semester following the date of the child's first birthday.

that: "Other societies . . . consider [pregnancy] a far less debilitating condition than does American society."⁶ The Southern District of Ohio then held:

"Any regulation which sets an arbitrary and fixed date by which pregnant employees must resign must be based on presumptions concerning sexual characteristics and roles as no two pregnancies present identical medical or psychological problems. Such a regulation, unless it is supported by a reasonable, factual basis is discriminatory against women . . ." *Heath v. Westerville Board of Education*, 345 F. Supp. 501, 507 (S.D. Ohio 1972).

Earlier this year, in *Green v. Waterford Board of Education*, 473 F.2d 629 (2d Cir. 1973), another mandatory maternity leave case, the Second Circuit Court of Appeals was also persuaded that a forced maternity rule encompasses a sexually discriminatory classification:

"Plaintiff admits the obvious, that men do not become pregnant, but points out that men, being human, are also subject to crises of the body, some of which, like childbirth, give ample warning: A cataract operation or a prostatectomy, for example, may be planned months ahead. Because male teachers are not forced by defendant Board to take premature leave because of a known forthcoming medical problem, female teachers should not be treated differently. Thus

⁶ The Southern District of Ohio considered writings of Ashley Montague on the effect of pregnancy on women in non-literate societies, MONTAGUE, *THE NATURAL SUPERIORITY OF WOMEN* 16-17 (rev. ed. 1970), and concluded: "This tends to suggest that the defendant Board's very solicitous treatment of pregnancy, including the requirement that the new mother not return to her job for one year following delivery is more a manifestation of cultural sex role conditioning than a response to medical fact and necessity. The fact that Mrs. Heath does not fit neatly into the stereotyped vision the defendant Board has of the 'correct' female response to pregnancy should not redound to her economic or professional detriment." *Heath v. Westerville Board of Education*, 345 F. Supp. 501, 505-506, n. 1 (S.D. Ohio 1972).

stated, the argument is persuasive, even compelling. One realizes with a shock what so many women now proclaim: Old accepted rules and customs often discriminate against women in ways that have long been taken for granted or have gone unnoticed." 473 F.2d at 634.

Still more recently, the Tenth Circuit Court of Appeals in *Buckley v. Coyle Public School System*, 476 F.2d 92 (10th Cir. 1973), considered a mandatory maternity rule and concluded that it was sexually discriminatory:

"We start with the most obvious of the alleged violations and that is the charge of discrimination based on sex. The trial court's attempted distinction between discriminatory and non-discriminatory regulations as being whether the condition involved is one which was involuntary must be rejected. The fact, if it be a fact, that pregnancy is a voluntary status really has nothing to do with the question. *The point is that the regulation penalizes the feminine school teacher for being a woman and, therefore, it must be condemned on that ground.*" 476 F.2d at 94 (*emphasis added*).

Many federal district courts have been similarly persuaded that mandatory maternity rules discriminate against women on the basis of their sex. *Seamen v. Spring Lake Park Independent School District*, No. 16, ___ F. Supp. ___, 5 EPD ¶ 8467 (D. Minn. 1973); *Bravo v. Board of Education*, 345 F. Supp. 155 (D. Ill. 1972); *Pocklington v. Duval County School Board*, 345 F. Supp. 163 (D. Fla. 1972); *Monell v. Department of Social Services*, ___ F. Supp. ___, 4 FEP Cases 883 (S.D.N.Y. 1972); *Williams v. San Francisco Unified School District*, 340 F. Supp. 438 (N.D. Cal. 1972). See also, *Jinks v. May*, 332 F. Supp. 254 (N.D. Ga. 1971); *Ordway v. Hargraves*, 323 F. Supp. 1155 (D. Mass. 1971).

In a case raising the issue of whether a denial of disability insurance benefits to otherwise qualified, although

pregnant, women, discriminates on the basis of sex, a three-judge court, after citing *Heath, supra*, with favor, stated:

"... a realistic look at what women actually do even in our society belies the belief that they cannot generally work throughout pregnancy . . . Nevertheless, the belief that pregnant women are disabled for substantial periods results in their being denied the opportunity to work, unemployment compensation benefits designed to aid those able to work, and—because of the belief that they will submit large claims—disability insurance benefits. See generally, Walker, *Sex Discrimination in Benefits Programs*, 23 HASTINGS L. J. 277, 282-84, 285 (1971). Thus, the apparently solicitous attitude that pregnant women are in a 'delicate condition' has the effect that they often cannot earn an income or obtain the usual social welfare benefits for the unemployed. The only way to assure that this irrational result is not simply the product of mistaken stereotypical beliefs is to require, as the equal protection clause does, that each pregnant woman be considered individually". *Aiello v. Hansen*, --- F. Supp. ---, No. C 72-1402 SW slip opinion at p. 13 (N.D. Calif. May 31, 1973) (three-judge court) (citations omitted).

Sex discrimination has been prohibited under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and legislation of many states. Interpretation of these statutes by courts and administrative agencies has tended to follow the lead of those federal courts which have found that when more restrictions are imposed upon pregnant wom-

en than upon persons with other temporary medical disabilities, sex discrimination has occurred.⁷

⁷ Administrative interpretation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, specifically provides that an employer's refusal to treat pregnancy like other temporary disabilities is in violation of the Act's prohibition of sex discrimination. 29 C. F. R. § 1604.10. Other federal agencies agree that an employer's failure to accord pregnancy as advantageous treatment as other temporary medical disabilities is today illegal. See, U. S. Dep't of Labor, Office of Federal Contract Compliance, *Sex Discrimination Guidelines*, 41 C. F. R. 60-20.3 (g); Department of Health, Education and Welfare, *Higher Education Guidelines*, 37 Fed. Reg. 224, p. 24686 (1972).

The following are illustrative of state court decisions: *Cerra v. East Stroudsburg Area School District*, 299 A.2d 277 (Pa. S. Ct. 1973); *Orner v. Board of Appeals*, Case No. 132572 (Super. Ct., Balt. City, July 28, 1972); *Allison v. Board of Education Union Free School District No. 22, Nassau*, 333 N.Y.S.2d 261 (1972); *Sable v. Wantagh School District No. 23*, 331 N.Y.S.2d 686 (1972); *Truax v. Edmonds School District #15*, Dkt. No. 107915 (Super. Ct., Snohomish County, Washington, July 30, 1971); *Blair v. New Milford Board of Education*, No. EO 2Es-5337 (Sup. Ct. Hackensack, N.J.) (Jan. 20, 1971).

State administrative rulings include decisions such as *Awadallah v. New Milford Board of Education*, N.J. Dept. Law and Public Safety (Sept. 29, 1971); and *Colley v. Board of Education*, Department of Human Relations, Waterford, Wisconsin (Feb. 1, 1971), and opinions of attorneys general interpreting restrictions on the right of pregnant women to work as illegal. See, e. g., Opinion of Michigan Attorney General, February 18, 1972.

For a discussion of arbitration decisions see, Sipser, *Maternity Leave: Judicial and Arbitral Interpretation*, 1970 - 1972, 24 LABOR LAW JOURNAL 173 (March, 1973).

For legal comment on these matters, see generally, Koontz, *Childbirth and Child Rearing Leave: Job Related Benefits*, 17 N.Y.L.F. 480 (1971); Comment, *Love's Labors Lost: New Conceptions of Maternity Leaves*, 7 HARV. CIV. RTS. CIV. LIBS. L. REV. 260 (1972).

While not unanimous,⁸ the great weight of judicial authority today is in keeping with the Court of Appeals for the Sixth Circuit. That court, when considering the mandatory maternity regulation here challenged, concluded:

"... we deal with a rule which is inherently based upon a classification by sex. Male teachers are not subject to pregnancy, but they are subject to many types of illnesses and disabilities." *LaFleur v. Cleveland Board of Education*, 465 F.2d 1184, 1188 (6th Cir. 1972).

II. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT PROHIBITS RESTRICTING THE EMPLOYMENT RIGHTS OF WOMEN WHO GIVE BIRTH WHEN SIMILAR RESTRICTIONS HAVE NOT BEEN PLACED UPON EMPLOYEES WITH OTHER TEMPORARY MEDICAL DISABILITIES

Chief Judge Haynesworth has noted that since: "[O]nly women experience pregnancy and motherhood ... all possibility of competition between the sexes in this area" is removed. *Cohen v. Chesterfield County School Board*, 474 F.2d 395, 397 (4th Cir. 1973). While men can-

⁸ See, *Cohen v. Chesterfield County School Board*, 474 F.2d 395 (4th Cir. 1972), cert. granted, ___ U. S. ___, 93 S. Ct. 1925 (1973); *Schattman v. Texas Employment Commission*, 459 F.2d 32 (5th Cir. 1972), cert. den., ___ U. S. ___, 93 S. Ct. 901 (1973), reh. den., ___ U. S. ___, 93 S. Ct. 1414 (1973); *Parman v. Wilkerson*, ___ F. Supp. ___, 5 FEP Cases 675 (E. D. Va. 1973). See also, the military maternity cases: *Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971), cert. granted, ___ U. S. ___, 93 S. Ct. 292 (1972), judgment vacated and case remanded for determination of mootness, ___ U. S. ___, 93 S. Ct. 676 (1972); *Gutierrez v. Laird*, 346 F. Supp. 289 (D. D. C. 1972); and *Flores v. Secretary of Defense*, 355 F. Supp. 93 (N.D. Fla. 1973); contra, *Robinson v. Rand*, 340 F. Supp. 37 (D. Colo. 1972).

not bear children, they are subject to other temporary medical disabilities.⁹

Man's non-pregnant state, in logic, carries with it no necessary conclusion that men, therefore, should gain some imposed advantage over women in the competition of the market place. Most women work at some time during their lives,¹⁰ and most women bear children.¹¹ Employment opportunity for the two sexes remains unequal¹² and disabilities imposed upon pregnancy bear a major responsibility for woman's economically disadvantaged lot.¹³

⁹ A recent study analyzing absenteeism and labor turnover found that although women lost more worktime because of acute conditions, men lost more time because of chronic conditions. As such, the total financial loss caused by all absences of women was about the same as that caused by absences of men. U. S. Dep't. of Labor, Wage & Labor Standards Administration, *Facts About Women's Absenteeism and Labor Turnover* (1969). See also, case study demonstrating that implementation of the Equal Employment Opportunity Commission's *Guidelines on Discrimination Because of Sex*, Title 29, Chapter XIV, Part 1604, Section 1604.1 to 1604.10 as amended, requiring employers to treat pregnancy like other temporary medical disabilities for purposes of sick leave and disability benefits, would have a negligible impact upon labor costs. Greenwald, *Maternity Leave Policy*, NEW ENGLAND ECONOMIC REVIEW, p. 13 (Jan./Feb. 1973).

¹⁰ During 1972, only 11% of all women aged 16 and over had never been in the labor market. U. S. Dep't of Labor, Bureau of Labor Statistics, 19 *Employment and Earnings* No. 7, Table 33, p. 148 (1973).

¹¹ Only 15.6% of married women, age 20 and over, are childless. U. S. Dep't of Commerce, Bureau of the Census, *Census of Population 1970, Detailed Characteristics*, P.C. (1)-D1-U.S. Summary Table 212, p. 41 (1971).

¹² During 1972, earnings of full-time, year-round women workers averaged only 59.5% of men's wages. U. S. Dep't of Commerce, Bureau of the Census, "Money Income in 1971 of Families and Persons in The United States", Table 56, *Current Population Reports*, Series P-60, No. 85 (1972).

¹³ Testimony of Herbert Stein and Marjorie Whitman of the President's Council of Economic Advisors before the Senate-House Joint Economic Committee, July 10, 1973, points to lack of continuous work experience being a most important factor in women's lower salary levels. (See pages 4-7 of authors' manuscript of testimony).

Since, in this case, as in others,¹⁴ no general rule of an inflexible nature has been adopted with respect to other types of medical conditions which employees suffer, Respondents contend that their treatment at the hands of the Cleveland Board of Education has been discriminatory in violation of the equal protection of the laws which the Fourteenth Amendment guarantees them.

In considering the claim of Petitioners that the Court of Appeals for the Sixth Circuit has strayed outside proper constitutional bounds in ruling in favor of the Respondents, the first question for this Court's attention is the appropriate standard of review. Petitioners have suggested that selection of the proper test of equal protection should be tailored to the subject matter of inquiry before the court. Since *San Antonio Independent School District v. Rodriguez*, ___ U. S. ___, 93 S. Ct. 1278 (1973), deals with school financing, Petitioners contend that the most lenient test of equal protection there used should govern in this case. On the other hand, for reasons unclear, Petitioners assert that the test of equal protection used in *Frontiero v. Richardson*, ___ U. S. ___, 93 S. Ct. 1764 (1973), is inappropriate here (Pet. Br. 2-3). Respondents can only speculate that perhaps the claimed lack of relevance of *Frontiero* results from its consideration of a military, rather than a school, matter. In fact, *Frontiero* like *La Fleur* relates to the employment rights of women, and is readily distinguishable from *Rodriguez* where this Court itself, recognizing a most important distinction, held the Texas school financing plan not to be the "product of purposeful discrimination against any group or class." *Rodriguez*, 93 S. Ct. at 1308.

¹⁴ To the best of Respondents' knowledge, in no school board mandatory maternity case has any board of education adopted an inflexible rule applying to any temporary medical disability other than pregnancy.

Despite the imaginative nature of Petitioners' comments concerning the proper selection of an equal protection test, Respondents firmly believe that usual methods of analysis are appropriate to determine the test here to be applied. Such an analysis dictates affirmance of the ruling of the Court of Appeals.

A. The Standard of Review

The Fourteenth Amendment's test of equal protection, used from early days in the history of this Court, traditionally has upheld a classification if it could be shown that the classification had a reasonable and just relation to a permissible legislative objective. As the court stated in *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920):

"... the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." 253 U.S. at 415.

In recent years, however, the Court has recognized that under certain circumstances a more rigid standard of review must be applied. The invidious nature of the distinction requires more attentive review when classifications distinguish on the basis of characteristics pointed out by Justice Stewart in his concurring opinion in *Rodriguez*, such as a person's race, *McLaughlin v. Florida*, 379 U.S. 184 (1964); national origin, *Oyama v. California*, 332 U.S. 633, 644-646 (1948); alienage, *Graham v. Richardson*, 403 U.S. 365, 372 (1971); indigency, *Griffin v. Illinois*, 351 U.S. 12 (1956); or illegitimacy, *Gomez v. Perez*, --- U.S. ---, 93 S. Ct. 872 (1973); *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972); *Rodriguez*, 93 S. Ct. at 1311.

Labeling classifications of this kind "suspect," the court now subjects them to rigid scrutiny and requires a showing of a compelling government interest to uphold them. The rationale for requiring proof of a compelling government need for such classifications is clear: An individual should not be penalized for an accident of birth over which he has no control. *Frontiero*, 93 S. Ct. at 1770.

The court has also applied the stricter standard of review where classifications adversely affect a fundamental right explicitly or implicitly protected by the Constitution. *Rodriguez*, 93 S. Ct. at 1297. When fundamental rights are at stake, the government must show that its challenged rule is the "least restrictive alternative" available to accomplish the required governmental objective. *Rodriguez*, 93 S. Ct. at 1306.

1. Petitioners' Mandatory Maternity Rule Must Be Subjected to Strict Judicial Scrutiny for Two Reasons, Either One of Which Alone Would Require Its Use

Strict judicial scrutiny must be exercised where a classification is suspect or where it impairs fundamental rights. Respondents contend that where, as here, a suspect classification adversely affects fundamental rights, it is particularly appropriate to require Petitioners to demonstrate that their regulation, which singles out and restricts the right to work of its pregnant employees, is both necessary and "the least restrictive alternative" available. *Buckley, supra*, 476 F. 2d at 96; *Sail'er Inn, Inc., v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529 (1971).

(a) The Maternity Regulation Creates a Classification Based on Sex and Now Must Be Considered Suspect

Respondents contend that the Petitioners' mandatory maternity rule embodies a classification based upon sex.

A person's sex is a constant personal characteristic similar to other indicia which have led classifications to be declared suspect. At the same time, it is as irrelevant as these other immutable characteristics to a person's ability to contribute to society. For these reasons, four Justices of this Court, finding "implicit support" for their approach from *Reed v. Reed*, 404 U.S. 71 (1971), have now concluded that classifications based upon sex must be subjected to strict judicial scrutiny. *Frontiero*, 93 S. Ct. at 1771.

Respondents believe that examination of cases earlier decided by this Court will demonstrate that the plurality opinion of *Frontiero* represents no abrupt break with established judicial precedent, but indeed, for the first time, states clearly a position now long overdue.

(i) *Muller and Goesaert Are Now Outdated*

Prior to the development of a separate test of equal protection for classifications which are suspect or which adversely affect fundamental rights, this Court had been presented with only a handful of cases involving classifications based on sex. Still fewer of these cases raised important issues relating to the employment of women. *Muller v. Oregon*, 208 U.S. 412 (1908), was the first of these employment cases; *Goesaert v. Cleary*, 335 U.S. 464 (1948), was the last decided by this Court prior to *Frontiero*. In both *Muller* and *Goesaert*, the Court, using a lenient standard of review, upheld the legislative classifications challenged. Over the years these decisions have been strongly criticized by courts and commentators.¹⁵

In *Muller v. Oregon*, the Court confronted the issue whether a limitation on the number of hours which women might work in certain types of establishments should

¹⁵ See, *infra* pp. 30, 32-35.

be upheld. Earlier, in *Lochner v. New York*, 198 U.S. 45 (1905), the courts had struck down a state statute limiting the number of hours per day and per week that men and women could work in bakeries. While in *Lochner* the court refused to countenance a general limitation on hours of work, in *Muller*, it deemed it permissible to do so since only women were affected. In upholding the sexual classification challenged, the Court, in *Muller*, commented at length on woman's inferior position and status:

"[H]istory discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. . . . Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. . . . Doubtless there are individual exceptions . . . but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality." 208 U.S. at 421-22.

The Supreme Court's opinion in *Muller* was first criticized judicially more than fifty years ago in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), when the court upheld as valid a minimum wage statute of the District of Columbia. While the Court took care not to overrule *Muller*, it was not able to accept:

" . . . the doctrine that women of mature age, sui juris, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the

implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships." 261 U. S. at 553.

The authority of *Adkins* was gradually eroded in later cases¹⁰ and eventually was reversed by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), where the Court upheld as constitutional a Washington statute establishing a minimum wage for women. The reasoning of the court in *Parrish* took note of woman's employment status:

" . . . they are in the class receiving the least pay, . . . their bargaining power is relatively weak, and . . . they are the ready victims of those who would take advantage of their necessitous circumstances . . . The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The base cost of living must be met . . . The community is not bound to provide what is in effect a subsidy for unconscionable employers." 300 U.S. at 398-399.

The decisions of this Court in *Muller*, *Adkins*, and *Parrish*, in light of *Lochner* all assumed the unconstitutionality of protective legislation applying equally to men and women. Beginning from this now outdated starting point, the Court reached different conclusions whether restrictions on working hours might be imposed on women alone. **A contemporary reading of the three cases with**

¹⁰ See discussion of specific cases in *West Coast Hotel Co. v. Parrish*, 300 U.S. at 397-398.

respect to this Court's interpretation of the equal protection clause suggests that the Court's better reasoning was expressed in *Adkins*. While *Muller* is all too often cited in support of those who would shore-up out-moded views of woman's place, the more modern approach of *Adkins*, is generally now forgotten. See, e.g., citation to *Muller* in the District Court's opinion in *LaFleur*, 326 F. Supp. at 1212.

The Court of Appeals for the Ninth Circuit and the California Supreme Court are the first appellate courts since *Adkins* to comment adversely on *Muller*'s stereotypical view of the female sex. *Mengelkoch v. Industrial Welfare Commission*, 442 F.2d 1119 (9th Cir. 1971); *Sail'er Inn, Inc. v. Kirby*, *supra*. The Court of Appeals in *Mengelkoch*, where a state statute limiting the hours of work for women was the subject of the challenge, pointed to a number of reasons why it could find no precedential value in *Muller*. Of primary present concern is the fact that in *Muller*, no invidious discrimination was ever claimed by a member of the class allegedly being protected—women themselves. Rather the employer was seeking relief from complying with the requirements of the statute. 442 F.2d at 1123. In *Sail'er Inn*, the California Supreme Court, in a unanimous opinion, commented with blunt honesty on the equal protection rationale of *Muller*: "No judge today would justify classifications based on sex by resort to such openly biased and wholly chauvinistic statements as this one made by Justice Brewer in *Muller* . . ." 5 Cal. 3d at 17, n. 15.

Scholarly comment of *Muller* has mirrored judicial criticism. The views of the *Muller* court were labeled "male supremacist assumptions," by two legal scholars in a recent article.¹⁷ Another legal writer concluded that

¹⁷ Johnson, Jr., and Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. Rev. 675, 699 (1971).

the *Muller* decision, "served to strengthen sex bias," and reflected views of a different era. Professor Murray voiced the need for *Muller* now to be re-examined and discarded:

"The *Muller* decision reflected an era when women were politically disfranchised, represented only about 18% of the labor force, lacked the protection of strong unionization or federal labor standards legislation, and were particularly vulnerable to extreme forms of exploitation. It also reflected the traditional view of male dominance through the Court's paternalistic observation that woman is so constituted that she would continue to depend upon and look to man for protection even if all statutory restrictions were removed and she stood on an absolutely equal plane with him.

The sweeping language of the *Muller* decision served to strengthen sex bias. . . . Whatever may have been the justification for the legal protection of women workers in 1908, the doctrine that 'sex is a valid basis for classification,' like the racial 'separate but equal . . .', has produced discriminatory results which overshadow any continuing utility. In the light of changed conditions and attitudes, *Muller* should be re-examined and discarded." MURRAY, *THE RIGHTS OF WOMEN, THE RIGHTS OF AMERICANS*, 521, 524 (N. Dorsen, ed. 1971).

In *Goesaert v. Cleary*, *supra*, the Supreme Court decided another employment case arising under the Fourteenth Amendment. In *Goesaert*, the court upheld a state statute barring women from employment as bartenders in the same establishments in which they were permitted to serve as waitresses. Relying on *Muller* as a precedent, Justice Frankfurter refused to consider the economic detriment allegedly imposed on women by the statute, and opted for a static interpretation of the Constitution. 335 U.S. at 466. Without commenting specifically on his earlier opinion in *Goesaert*, Justice Frankfurter in later years

retreated from the narrow view that he had taken there and, refusing "to be obfuscated by medieval views regarding the legal status of women and the common law's reflection of them," declined to follow an ancient common law doctrine that man and wife are legally one. *U. S. v. Dege*, 364 U.S. 51, 52 (1960).

With *Goesaert* reposing on the shaky basis of *Muller*, it is not surprising that both courts and commentators in recent times have refused to acknowledge its authority. The New Jersey Supreme Court, struck down a local ordinance barring women from employment as bartenders in *Paterson Tavern & Grill Owners Assn. v. Borough of Hawthorne*, 57 N.J. 180, 270 A.2d 628 (1970). Finding that the ordinance was not a necessary and reasonable exercise of the police power, the court stated: "In the current climate the law may not tolerate blanket municipal bartending exclusions grounded solely on sex." 57 N. J. at 189, 270 A.2d at 633.

More recently, the California Supreme Court has invalidated a state statute similar to the one upheld in *Goesaert*, specifically refusing to follow the earlier case as precedent. *Sail'er Inn*, *supra*. Pointing out that *Goesaert* was decided "well before the recent and major growth of public concern about and opposition to sex discrimination," 5 Cal. 3d at 21, n.15, the court went on to note that while "*Goesaert* has not been overruled, its holding has been the subject of academic criticism." 5 Cal. 3d at 21. The court made specific mention of the criticism leveled at *Goesaert* in KANOWITZ, *WOMEN AND THE LAW*, pp. 33-34 (1969), and Oldham, *Sex Discrimination and State Protective Laws*, 44 DEN. L. J., 344, 373-374 (1967). Other recent commentators have also been far from charitable to *Goesaert*. An article in the *YALE LAW JOURNAL* suggests that. ". . . Justice Frankfurter's off-hand dismissal of

women's basic civil rights to engage in an occupation might seem outrageous today. . . ." Emerson, et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L. J. 872, 873 (1971), while Johnson, Jr. and Knapp, *supra*, n.16, regard the view of *Sail'er Inn*, to be "a remarkable decision . . . irreconcilable with the sexist assumptions underlying [*Goesaert*]." 46 N. Y. U. L. REV. at 690, 691. In their independent examination of the equal protection cases involving sex discrimination, Johnson, Jr. and Knapp concluded:

" . . . by and large the performance of American judges in the area of sex discrimination can be succinctly described as ranging from poor to abominable. With some notable exceptions, they have failed to bring to sex discrimination cases those judicial virtues of detachment, reflection and critical analysis which have served them so well with respect to other sensitive social issues. Particularly striking, we believe, is the contrast between judicial attitudes toward sex and race discrimination. Judges have largely freed themselves from patterns of thought that can be stigmatized as "racist"—at least their opinions in that area exhibit a conscious attempt to free themselves from habits of stereotypical thought with regard to discrimination based on *color*. With respect to sex discrimination, however, the story is different. 'Sexism,'—the making of unjustified (or at least unsupported) assumptions about individual capacities, interests, goals and social roles solely on the basis of sex differences—is as easily discernible in contemporary judicial opinions as racism ever was." *Id.* at 676.

It is hardly surprising that this Court upheld sexually discriminatory classifications as constitutional in *Muller*, and in *Goesaert*; only in recent years has the strict standard of review been uniformly used to test invidious classifi-

cations. While the Court has had occasion to consider other cases involving Fourteenth Amendment challenges to classifications based on sex, since *Goesaert* only one of these, *Frontiero*, *supra*, has related to women's employment rights. Examination of the Fourteenth Amendment sex discrimination cases presented to the Court during this decade reveals that all have involved classifications so ill-suited to accomplish any legitimate governmental objective that this Court has found them unable to be sustained under the lenient test of reasonableness.¹⁸

- (ii) *The Time is Now Appropriate for this Court to Declare Sex Discrimination No Less Invidious than Other Types of Discrimination Now Declared to be Suspect.*

The present case is a particularly appropriate one for this Court to make clear that invidious sex discrimination will not be countenanced.

Recently the Court has set forth the "traditional indicia" of a classification that is suspect. In denying suspect status in the Texas School financing case, the Court described these characteristics:

"[T]he class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Rodriguez*, 93 S. Ct. at 1294.

¹⁸ *Reed v. Reed*, 404 U.S. 71 (1971) (striking down a mandatory provision of the Idaho probate code which preferred men over women in the administration of a decedent's estate); *Stanley v. Illinois*, 405 U.S. 645 (1972) (declaring unconstitutional legislation denying unwed fathers parental status); and *Frontiero v. Richardson*, ___ U.S. ___, 93 S. Ct. 1764 (concurring opinion) (1973), (declaring unconstitutional federal statutes which provided that spouses of male members of the armed forces are dependents but that spouses of female members are not dependents unless they are in fact dependent).

Women as a class historically have been saddled with weighty burdens of varied nature exhibiting all, rather than just one, of these traditional indicia. Quoting from Justice Bradley's opinion one hundred years ago in *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873), Justice Brennan, in *Frontiero*, points out that our nation has had a long and unfortunate history of sex discrimination. Our statute books have gradually become "laden with gross, stereotypical distinctions between the sexes," 93 S. Ct. at 1769. Justice Brennan's opinion in *Frontiero* also recognizes that:

"[T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. . . . And although blacks were guaranteed the right to vote in 1870, women were denied even that right—which is itself 'preservative of other basic civil and political rights'—until adoption of the Nineteenth Amendment half a century ago." 93 S. Ct. at 1769-1770 (citations and footnotes omitted).

After noting that the position of women has improved in recent decades, Mr. Justice Brennan, writing for the plurality in *Frontiero*, states:

"Nevertheless, it can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, on the job market and, perhaps most conspicuously, in the political arena." 93 S. Ct. at 1770 (citations and footnotes omitted) (emphasis added).

The *Frontiero* plurality also recognized the vast underrepresentation of women at decision making levels of government. Pointing specifically to the Presidency, this Court itself, the United States Congress, and all levels of state and federal government, Mr. Justice Brennan therein explained this underrepresentation to be in part a present effect of past discrimination. 93 S. Ct. at 1770, n .17.

The United States Congress in the days of *Muller* and *Goesaert* took no broad position prohibiting sex discrimination in employment. With the enactment of the Equal Pay Act of 1963, 29 U.S.C. § 201 (d) *et seq.*, shortly followed by the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, national policy of the United States finally focused on the elimination of invidious discrimination whether based on race, color, religion, sex or national origin. While the new legislation at first did not apply to governmental employers, this omission has now been rectified. The Equal Employment Opportunity Act of 1972, Public Law 92-261. Prior to enactment of this amendatory legislation, a number of cases questioned whether the Fourteenth Amendment required public employers to be held to Title VII standards in race discrimination cases. The Courts of Appeal for the First,¹⁹ Second²⁰ and Eighth²¹ Circuits have now all applied Title VII testing standards to Fourteenth Amendment cases.

Since Congressional intent, as evidenced in the Civil Rights Act of 1964, now places sex discrimination in employment on as illegal a footing as the other types of discrimination attacked, that Act indicates that, particularly in employment discrimination cases, national policy now

¹⁹ *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972).

²⁰ *Chance v. Board of Examiners*, 458 F.2d 1167 (2nd Cir. 1972).

²¹ *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1972), *cert. den.* 406 U.S. 950 (1972).

requires classifications based on sex to be tested against no more lenient a standard than that applied to other characteristics also rendered illegal by the Act. Such treatment has been called for by legal scholars,²² and indeed, the state courts of California now require that the same strict standard of review be exercised in sex discrimination cases as those based on race or ancestry.

In *Sail'er Inn v. Kirby*, the California Supreme Court, after recognizing *U.S. ex rel. Robinson v. York*, 281 F. Supp. 8 (D. Conn. 1968), as a precedent for placing sex in a suspect category, explained at length why sexual classifications deserve such treatment, particularly in those instances where the plaintiff seeks relief from employment discrimination:

"Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from nonsuspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society. The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members. Where the relations between characteristic and evil to be prevented is so tenuous, courts must look closely at classifications based on that characteristic lest outdated social stereotypes result in invidious laws or practices.

"Another characteristic which underlies all suspect classifications is the stigma of inferiority and second class citizenship associated with them. Women, like Negroes, aliens, and the poor have historical-

²² See, Note, *Are Sex-Based Classifications Constitutionally Suspect?*, 66 Nw. U. L. Rev. 481 (1971); Note, *Fair Employment-Is Pregnancy A Sufficient Reason For Dismissal Of A Public Employee?*, 52 Bost U. L. Rev. 196, 201 (1972).

ly labored under severe legal and social disabilities. Like black citizens, they were, for many years, denied the right to vote and, until recently, the right to serve on juries in many states. They are excluded from or discriminated against in employment and educational opportunities. Married women in particular have been treated as inferior persons in numerous laws relating to property and independent business ownership and the right to make contracts.

"Laws which disable women from full participation in the political, business and economic arenas are often characterized as 'protective' and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage. We conclude that the sexual classifications are properly treated as suspect, particularly when those classifications are made with respect to a fundamental interest such as employment." 5 Cal. 3d at 18 (citations and footnotes omitted).

The indicia of suspect status earlier described, and the goals of national policy established by the Congress of the United States now require this Court to recognize that sex is at least as immutable a characteristic of birth as race, national origin, alienage, or illegitimacy, and, therefore, is deserving of consistent treatment.²³ To deny

²³ Even prior to this Court's decision in *Reed*, question was raised by Professor Cox and others as to the inconsistent treatment accorded different classifications under the Equal Protection Clause:

"In short, the decisions, as Professor Cox points out have failed to elaborate 'a rational standard, or even points of reference, by which to judge what differentiations are permitted and when equality is required.'²⁶⁰ Why is a classification based on sex treated differently from one based on alienage?²⁶¹" *Developments In The Law—Equal Protection*, 82 HARV. L. REV. 1065, 1123 (1969).

(Footnote continued on following page)

sex suspect status would destroy the very rationale used by this Court in earlier years to legitimize original deviation from the traditional standard of review.

(b) *The Mandatory Nature of the Rule Adversely Affects Respondents' Fundamental Right to Bear and Raise Children.*

Since this Court decided the "grandfather of fundamental interest equal protection cases"²⁴ more than thirty years ago, it has been clear that the right to bear children is "one of the basic civil rights of man." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). In *Skinner* the Court exercised "strict scrutiny" in examining a statute requiring sterilization of certain types of habitual criminals.

The Court's decision in *Skinner* had been heralded by several earlier decisions recognizing the "right to marry, establish a home and bring up children" to be an essential part of the liberty guaranteed by the Fourteenth Amendment. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Shortly thereafter, this Court also proclaimed the right of parents "to direct the upbringing and education of children under their control." *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925). In *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), it was pointed out that these

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260. Cox, *The Supreme Court, 1965 Term, Forward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 95 (1966) (footnote omitted).

261. Compare *Goesaert v. Cleary*, 335 U.S. 464 (1948), with *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

²⁴ Gunther, *The Supreme Court—1971 Term, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. R. 1, 28 (1972), describing *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

two earlier decisions had "respected the private realm of family life which the state cannot enter."

These and other fundamental constitutional guarantees in turn have created a "zone of privacy" for home and family life secure from intrusions of the state. *Griswold v. Connecticut*, 381 U.S. 479 (1965). Thus, in *Griswold*, since the state was unable to show that its statute prohibiting the use of contraceptives was "necessary . . . to the accomplishment of a permissible state policy," this Court invalidated the state law concerned. 381 U.S. at 497-498 (Justice Goldberg concurring).

In *Eisenstadt v. Baird*, 405 U.S. (1972), the fundamental nature of the right to privacy was held not restricted to the married. Striking down a Massachusetts statute that prohibited distribution of contraceptives to unmarried persons, this Court stated:

"If the right of privacy means anything it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U.S. at 453.

In *Roe v. Wade* U.S. , 93 S. Ct. 705, 726 (1973), the Court ruled that a state may not constitutionally prohibit all abortions. In doing so the Court traced the origins of the right of privacy to *Palko v. Connecticut*, and defined the right to include those "personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'" *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)." In addition, the Court felt it clear that the right of privacy extends:

" . . . to activities relating to marriage, *Loving v. Virginia*, 338 U.S. 1, 12 (1967), procreation, *Skinner v. Oklahoma*, contraception, *Eisenstadt v. Baird*, family relationships, *Prince v. Massachusetts*, and child

rearing and education, *Pierce v. Society of Sisters*, and *Meyer v. Nebraska*, *supra*.

This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent." *Roe v. Wade*, 93 S. Ct. at 726 (citations omitted).

The Court in *Roe* then reaffirmed its holding that the regulation of fundamental rights, "may be justified only by a 'compelling state interest' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake". 93 S. Ct. at 728 (citations omitted).

The strict scrutiny test is applicable not only where denial of a fundamental right is absolute, but also where state regulation penalizes its free exercise. Thus, in *Shapiro v. Thompson*, 394 U.S. 618, 634 (1968), statutory provisions were subjected to the compelling government interest test where eligibility to receive welfare benefits was restricted to state residents of at least one year. This Court found that, by establishing a waiting period, benefits were denied to otherwise eligible applicants solely because they had recently moved into the jurisdiction, 394 U.S. at 627. The Court in *Shapiro* held the challenged statutes unconstitutional due to the impact of the waiting period upon the "constitutional right to travel from one State to another. . . . [a] right that has been firmly established and repeatedly recognized," 394 U.S. at 630, quoting from *United States v. Guest*, 383 U.S. 745, 757-758 (1966). In *Dunn v. Blumstein*, 405 U.S. 330 (1972), the Court subjected Tennessee's durational residence requirement for eligibility to vote to strict judicial scrutiny. Reaffirming the authority of its analysis in *Shapiro*, the court once again found an infringement of the right to travel. 405 U.S. at 338-339.

Respondents submit that the analogy of *LaFleur* to *Shapiro* is exact. The Cleveland Board of Education's mandatory maternity rule establishes a waiting period during which pregnant women are disqualified from work²⁵. This minimum period of disqualification is eight months, longer by far than the time away from work recommended by any medical authorities known to Respondents for women whose pregnancies are normal.²⁶

²⁵ The California Supreme Court, in *Sail'er Inn, supra*, held that the statute involved infringed upon the plaintiff's fundamental right to work. See also, *Truax v. Raich*, 239 U.S. 33 (1915).

²⁶ Recent statements by medical authorities with respect to time away from work for childbirth include the following:

"It is estimated that nearly one-third ($\frac{1}{3}$) of all women of childbearing age in the United States are now in the labor force and even larger proportions of socio-economically less fortunate women are working. Although most studies have not found work in itself to be deleterious to the outcome of pregnancy, certain safeguards are recommended. Any occupation that subjects the pregnant woman to severe physical strain should be avoided. Ideally, no work or play should be continued to the extent that fatigue develops. Adequate periods of rest should be provided during the working day. Women with previous complications of pregnancy that are likely to be repetitive (for example, low birth weight infants) should minimize physical work." HELLMAN AND PRITCHARD, *OBSTETRICS* 340 (14th ed. 1971).

"It is desirable that the working woman see her physician during the first two or three months of pregnancy, both to verify the pregnancy and for a thorough initial examination. At this time, recommendation can be made regarding working during the remainder of pregnancy.

"If the patient continues in good health, feels well and the pregnancy proceeds normally, there is generally no reason why a normal working schedule cannot be continued until close to the expected date of delivery.

"The working woman, as all pregnant women, should maintain a good state of nutrition and get adequate rest and exercise. The patient and her employer should give consideration to these basic health needs in determining if a normal work schedule can be continued.

"Regular visits to the physician are an important part of good prenatal care and this should also be taken into con-

(Footnote continued on following page)

The waiting period in *LaFleur* thus penalizes Respondents' fundamental right to bear children. Furthermore, under Petitioners' mandatory maternity rule there is no way in which a school teacher, whether through family planning or by chance, may escape this penalty.

If, as in the case at bar, employees anticipate childbirth during the middle of a summer academic vacation, they will be required to leave work the preceding spring. Since their babies will not have reached the age of three months by the time school starts again in September, they are prohibited from returning to work for at least another semester. Any re-employment early in the next calendar

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sideration. At these visits, the patient and her physician can determine how long she should continue to work.

"Following delivery, adequate time should be allowed for a complete recovery from the effects of childbirth before resuming a full work load. Six weeks is generally the time required for physiological changes to return to normal. But in individual instances a longer time may be required for this or for adjustments of feeding or to the problems of baby care. A post partum check-up is important for the physician can determine at this time if the patient is able to resume a normal work schedule."

Approved by the American College of Obstetrics and Gynecology, Executive Committee, February 13, 1972. 16 *American College of Obstetrics and Gynecology Newsletter* No. 4, at 4 (1972).

Another recent article discusses studies which disprove those studies cited in Petitioners' Appendix by Stewart and Douglas claiming to indicate that prematurity is more likely to result in those mothers who work. These later studies reveal that:

"There is no significant difference between mothers of premature infants and control infants in the proportions gainfully employed and in the proportion working during the last trimester. These findings provide additional support for the view based on available evidence that employment during pregnancy is probably not associated with prematurity. Doubt has been cast upon the studies of Douglas and Stewart by Ferguson and Logan." 103 *AMERICAN JOURNAL OF OBSTETRICS AND GYNECOLOGY* 358, 366, 368 (1969).

year will be permitted only if a vacancy occurs: the language of the maternity policy provides no more than a preferential re-employment right to an available vacancy; it gives no prior claim to the exact position earlier held.

Since there is no way Respondents can avoid the impact of the mandatory maternity regulation, the rule unavoidably penalizes their right to bear children, thereby impairing Petitioners' fundamental rights. Petitioners admit the penalty, but deny its importance, stating:

"The only effect it has on pregnant school teachers is to deprive them of a few months' salary during a period of time when they are demonstrably not as able-bodied as they were before." (Pet. Br. 39).

Respondents deplore Petitioners' offhand deprecation of the effects of further economic sanctions on members of a class already severely disadvantaged.²⁷

2. The Strict Standard Applied: There is No Compelling Need for the Present Regulation in the Furtherance of Legitimate Governmental Objectives.

Respondents urge this Court to exercise strict judicial scrutiny and hold that Petitioners have not met their burden of proof. Respondents are convinced that the record will persuade the reader that the present rule is both overly broad, unnecessary, and therefore void.

Indeed, there must be some doubt that Petitioners are serious when they argue that, tested by the strict

²⁷ The impact of discrimination is seen most dramatically in the statistics depicting the economic profile of women who are heads of households, without a husband to help support their families. In March, 1972, twenty-two percent of all heads of households were women. "The median income of families headed by women was \$5,144 in 1971. The comparable figure for families headed by men was \$10,930." U. S. Dep't of Labor, Employment Standards Administration, Women's Bureau, *Facts About Women Heads of Households & Heads of Families* 2, 7 (1973).

standard of review, the mandatory maternity regulation must be upheld. In their discussion of strict scrutiny, Petitioners contend only that the evidence establishes:

"... that a pregnant school teacher after the fourth month of pregnancy is not as able-bodied in the classroom as she was before pregnancy. She cannot perform the physical tasks which she is required to perform with the same degree of mobility and ease that she could when not pregnant." (Pet. Br. 39)

No allegation is made that the Respondents or pregnant school teachers, as a class, cannot perform their classroom duties. Nor do Petitioners contend that this particular regulation, as opposed to one without as broad a sweep, is necessary to the accomplishment of legitimate legislative objectives. In fact, as noted by the Respondents in their Statement of the Case, *supra*, Mr. Tanczos, Supervisor of Secondary Education, has testified that if a uniform period of notice was required of a pregnant teacher planning to take a maternity leave, the needs of the Cleveland Board of Education would be adequately met. Since no necessity has been shown and, additionally, a less restrictive alternative is available, Respondents submit that under the strict standard of review, Petitioners' mandatory leave policy must fail.

Restrictions on a teacher's right to return to work as soon as she is once again medically able to teach must also be invalid. Indeed, Petitioners at no time have attempted to justify this portion of the rule and do not seek to do so now. As Chief Judge Phillips said, concurring in *La Fleur* in this respect: "No evidence was introduced in the District Court and no reasons offered to this Court as to how this requirement is related rationally to any legitimate objective of the Board." 465 F.2d at 1190. Failure to suggest either a purpose or a need for restricting the return

to work must be proof sufficient that such a regulation is unconstitutional under the strict standard of review.

B. The Mandatory Maternity Rule is Arbitrary and Capricious and So Must also Fail Under the More Lenient Standard of Review

The Court of Appeals applied the test of *Reed v. Reed*, 404 U.S. 71, 76-77 (1971), overruling the District Court which, in ruling in favor of the Board of Education, applied the now outmoded Equal Protection test of *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911). The *Lindsley* Court stated: "... if any state of facts reasonably can be conceived that would sustain the [classification], the existence of that state of facts at the time the law was enacted must be assumed." The Court of Appeals followed instead the standard of review set forth in *Reed v. Reed*, which is applicable where strict judicial scrutiny does not apply. In *Reed*, the Court adopted the test of *F. S. Royster Guano Co. v. Virginia*, *supra*, and clearly ruled that states may not legislate different treatment to persons placed by statute in "different classes on the basis of criteria wholly unrelated to the objective of that statute." Instead, "some ground of difference having a fair and substantial relation to the object of the legislation" must be present. 404 U.S. at 75-76.

Cases subsequent to *Reed* have demonstrated that its standard of review is now one of general applicability. The test of equal protection cited with favor in *Reed* was adopted by this Court again in *Eisenstadt v. Baird*, 405 U.S. at 446-447. In *Frontiero*, three Justices electing not to exercise strict judicial scrutiny used the test of *Reed v. Reed* instead and found the classification equally invalid under its standard of review. 93 S. Ct. 1764, 1773 (Justice Powell concurring).

Lower courts and commentators alike have taken note that equal protection now requires actual inquiry into the relationship between legislative means and ends before a challenged classification can be upheld. *Green v. Waterford Bd. of Education*, 473 F.2d at 633 (2d Cir. 1973); *Aiello v. Hansen*, *supra*, slip opinion at 8; Gunther, *supra*, at 41-42. Applying the revitalized test of equal protection to the facts at hand requires judicial examination of not the professed, but the actual, objectives of Petitioners' mandatory maternity regulation and how substantial the relationship is between these objectives and their rule. Respondents believe that inquiry will here reveal, as it has to other courts rejecting similar rules, the arbitrary and capricious nature of the Board of Education's mandatory regulation. *Green*, *supra*; *Bravo*, *supra*; *Pocklington*, *supra*; *Monell*, *supra*; *Williams*, *supra*.

1. The Regulation Appears to Have No Medical Objectives; The Evidence Supports Only One Substantive Objective: Keeping Pregnant Teachers Out of Sight

The evidence as summarized in Respondents' Statement of the Case, *supra*, does not support a finding that Petitioners' objectives include any direct bearing on requirements of health, whether it be for the expectant mother or her child. Hypothesizing that such a purpose could be found, the evidence nevertheless fails to establish any relationship between the mandatory aspect of the maternity rule and the end of safeguarding maternal health, at least as to the vast majority of teachers whose pregnancies are normal.²⁸

²⁸ Mandatory maternity regulations of some boards of education demonstrate their lack of medical foundation by making the periods away from work apply to adoptive, as well as natural mothers. See, e.g., *Heath v. Westerville Board of Education*, 345 F. Supp. at 503 (S. D. Ohio, 1972).

Since there was and is no medical reason for the adoption of the mandatory rule, Petitioners now claim its principal objective was to ensure classroom continuity. However, the evidence clearly demonstrates that in the present case the maternity rule was the cause rather than the cure of classroom discontinuity. That this is not infrequent is clear from other cases. See for example, *Seaman v. Spring Lake Independent School District*, *supra*, where preliminary relief was awarded to permit a pregnant teacher to continue teaching specifically to ensure continuity in her students' educational program. 5 EPD at 7268 (D.C. Minn. 1973).

The evidence presented in fact supports only one objective for the original adoption of the rule. The apparent purpose was simply that of keeping pregnant teachers out of sight. Since female teachers could legally be fired once they married, *Greco v. Roper*, 145 Ohio St. 243, 61 N.E. 2d 307 (1945)²⁹, adoption of a rule requiring them to stop working while pregnant was hardly controversial at the time it was adopted. Hearsay concerning children giggling at pregnant teachers was the only evidence offered for the rule from the Superintendent of Schools who recommended it. As the Court of Appeals for the Sixth Circuit first pointed out in *Abbot v. Mines*, 411 F.2d 353 (6th Cir. 1969), and reiterated again below: "Basic rights such as those involved in the employment relationship . . . cannot be made to yield to embarrassment." 465 F.2d at 1187. Other courts agree. The Second Circuit Court of Appeals considered the state interest of preventing classroom distractions caused by giggling children, "too trivial to men-

²⁹ State courts, of course, even in the 1940's, did not invariably uphold contract restrictions on a female teacher's right to marry. See for example, *Teggart v. School District, No. 52, Carroll County*, 88 S.W.2d 447. Note, however, reversal, 339 Miss. 223, 96 S.W. 335 (1936).

tion," stating that, "whatever may have been the reaction in Queen Victoria's time, pregnancy is no longer a dirty word." *Green v. Waterford Board of Education*, 473 F.2d at 635 (2d Cir. 1973). Furthermore, any purpose to keep pregnant teachers out of sight appears to be particularly absurd in the present case when, as noted earlier, Petitioners permit pregnant students to remain in their classes, *supra*, n. 3.

2. Irrebuttable Presumptions Embodied in the Maternity Rule Have Either Been Disproven or Are Irrelevant

The mandatory maternity rule of the Petitioners includes several irrebuttable presumptions which are invalid or irrelevant. The principal presumption is that pregnant women must be barred from jobs because they are disabled and can no longer perform their teaching functions. Since the rule includes this presumption, Petitioners strive in their brief to convince the reader that the presumption is correct without actually alleging it as proven fact. Indeed, *administrative necessity apart*, the Board of Education nowhere claims that pregnant women are physically disabled throughout any portion of their pregnancies or for any specified period of time thereafter. (See, e.g. Pet. Br. 24).

No evidence in this case supports such a presumption, and Petitioners, by pinning their case to such a guidepost, would be on a collision course with reality. Experts testifying agree: no restrictions on normal physical activity are required throughout pregnancy in the absence of complications. Medical opinion here mirrors common knowledge that:

"... centuries of human experience attest to the reality that pregnant women work throughout their pregnancies, whether that work be performed in

fields, mills, factories, stores or offices, or in homes cleaning houses, cooking, and tending their husbands and other children." *Struck v. Secretary of Defense*, 460 F.2d 1372, 1379 (9th Cir., 1972) (Circuit Judge Duniway, dissenting).

Recognizing the dilemma posed, the Board of Education has sought some way to draw a rational distinction between pregnancy and other medical disabilities in order to justify its special treatment of women anticipating childbirth. In so doing, Petitioners indicate another irrebuttable presumption on which their rule is based: namely, that all pregnancies are or can be "voluntary."

Petitioners state that the mandatory maternity rule, "deprives pregnant teachers of income . . . as a result of a physical condition which they have voluntarily assumed." (Pet. Br. 14) No federal appellate court to date, in considering the constitutionality of a mandatory maternity leave rule, has differentiated pregnancy from other temporary medical disabilities on the ground that it is voluntarily incurred. Indeed, Judge Haynesworth, writing the opinion of the court in *Cohen v. Chesterfield County School Board*, *supra*, sustaining the mandatory maternity regulation there challenged, admitted: "Of course, all pregnancies among teachers, as with other women, are not voluntary." 474 F.2d at 398, n. 8. The Tenth Circuit Court of Appeals in *Buckley v. Coyle Public School Systems*, *supra*, also noted that: "The fact, if it be a fact, that pregnancy is a voluntary status really has nothing to do with the question." 476 F.2d at 95.

No evidence in the record bears on this aspect of Petitioners' case, and true or false, Respondents dispute its relevance. Many temporary medical disabilities can result from voluntary actions. Doctors endlessly implore their patients to cut down smoking, drinking, or eating, and demand regular exercise instead. Man's failure to

heed such medical advice is never penalized by Petitioners with the severity reserved for pregnancy.

The Board of Education also argues that: "No female today, teacher or not, is required to become pregnant," citing to *Griswold*, *Eisenstadt*, and *Roe* (Pet. Br. 26). This argument appears intended to suggest that *Griswold*, *Eisenstadt*, and *Roe* established not rights but obligations. Has woman today having gained the right not to be pregnant against her will lost her former right to bear a child? No language of this court in *Griswold* or since has suggested the legitimacy of such a line of reasoning. Indeed, three Justices of the Court may have anticipated the issue now at bar eight years ago. In considering the test of equal protection to be applied in *Griswold*, Justice Goldberg, in a concurring opinion, stated:

"... if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid. In my view, however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected." 381 U.S. at 497.

Respondents submit that the Board of Education's regulation demands precisely what these Justices feared: teachers must exercise compulsory and effective birth control in order to gain and retain a governmental job. If the right to bear children is accorded at least the same recognition as the right to terminate a pregnancy, Petitioners' mandatory maternity rule must be invalid. See *Buckley, supra*, 476 F.2d at 96, n. 3, citing to *Roe v. Wade, supra*.

3. Administrative Convenience Has Been Rejected By This Court as Legitimizing Otherwise Illegal Sex Discrimination

If the defenses raised to allegations of sex discrimination in recent years have had one thing in common, it is that the classifications challenged invariably have been argued to be required for administrative needs. This was a prime argument in *Reed v. Reed* where a state statute established a mandatory preference for males over females for appointment to positions of administrators of estates. In *Stanley v. Illinois, supra*, n. 18, it was again alleged that administrative needs dictated the presumption that a natural father was not as entitled to be considered legal parent to his children as would a natural mother. Finally, in *Frontiero v. Richardson*, the United States claimed an administrative need to deny dependency benefits to spouses of female officers on an equal basis with the wives of male officers.

In *Reed* the court had pointed out, although the classification was "not without some legitimacy," where the state has drawn a sharp line between the sexes solely for administrative convenience it has made an arbitrary legislative choice. 404 U.S. at 76, 77. In *Stanley* the result reached was the same, with the Court stating that, "the Constitution recognizes higher values than speed and efficiency." 405 U.S. at 656. The concurring three Justices in *Frontiero* who decided the merits of the case under the standard of review of *Reed*, appear to have taken the same view of the assertion of administrative necessity as did the four Justices invalidating the classification under the stricter standard of review. 93 S. Ct. at 1773 (Justice Powell concurring).

Respondents fail to see how Petitioners' claim of administrative necessity is any more valid here than it was in these three earlier cases. Rational treatment of the

maternal condition requires that, like other disabilities, it must be treated on an individual basis.³⁰ Pregnancy, by its very nature, can never be more than a temporary condition. Regardless of when disability begins, its termination is ensured, whether by birth, miscarriage, or abortion. Unlike many other medical conditions, however, the maximum period of disability due to pregnancy can be computed with some accuracy. This aspect of predictability should make it easier for employers to cope with pregnancy than with other temporary disabilities. Apart from their desire for some advance notice before a leave of absence is taken some time prior to childbirth, Petitioners' administrative plea is unconvincing. Respondents believe that such a notice requirement, if applicable generally to all employees anticipating time away from work for medical reasons, would satisfy Petitioners' need without doing violence to Respondents' equal protection guarantee. *Green v. Waterford Board of Education, supra*, 473 F.2d at 635.

³⁰ That such treatment is perfectly possible within school systems is amply demonstrated by those maternity cases mooted after filing whether at the trial or appellate level. *Green, supra*, 473 F.2d at 636; *Guelich v. Mounds*, 334 F. Supp. 1276 (D. Minn. 1972). See also, *Struck, supra*, vacated for determination of mootness, 93 S. Ct. 676 (1972).

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals for the Sixth Circuit should be affirmed and the Cleveland Board of Education's mandatory maternity rule should be declared unconstitutional.

Respectfully submitted,

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SUPREME COURT, U. S.

Supreme Court of the United States

October Term, 1972

No. 72-777

CLEVELAND BOARD OF EDUCATION, et al.,
Petitioners,

vs.

JO CAROL LAFLEUR, et al.,
Respondents.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT**

**MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE
and
BRIEF AMICUS CURIAE IN SUPPORT OF
AFFIRMANCE.**

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TABLE OF CONTENTS

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE	1
BRIEF OF AMICUS CURIAE	3
Opinions Below	3
Jurisdictional Statement	3
Constitutional Provision Involved	4
Statute Involved	4
Question for Review	4
Statement of the Case	5
Summary of Argument	5

Argument:

I. The Mandatory Maternity Leave Regulation of the Cleveland Board of Education Discriminates against Women Employees of the Board in Violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution	6
A. The Regulation Is Unconstitutional Under the Traditional Reasonableness Standard	9
B. The Regulation Is Unconstitutional Under the Traditional Rational Basis Standard as Applied in Rodriguez	19
II. The Mandatory Maternity Leave Regulation of the Cleveland Board of Education Should Be Judged by the Strict Scrutiny Standard of Equal Protection	21

II

A. The Regulation is a Sex-Based Classification	21
B. The Regulation Abridges Respondents' Fundamental Constitutional and Civil Rights	26
C. No Compelling Governmental Interest Is Served by Petitioners' Regulation	32
III. Significant Authority Supports Respondents' Position that Mandatory Maternity Leave Regulations are Discriminatory	35
Conclusion	40

TABLE OF AUTHORITIES

Cases

<i>Atchison T. & S.F.R. Co. v. Matthews</i> , 174 U.S. 96 (1899)	9
<i>Awadallah v. New Milford Board of Education</i> , N.J. Dept. Law & Public Safety, Sept. 29, 1971	38
<i>Blair v. New Milford Board of Education</i> , No. E02ES-5337 (Sup. Ct. Hackensack, N.J., Jan. 20, 1971)	38
<i>Bolling v. Sharpe</i> , 347 U.S. 497 (1954)	24
<i>Bowe v. Colgate-Palmolive Co.</i> , 416 F.2d 711 (7th Cir. 1969)	34
<i>Bravo v. Board of Education of the City of Chicago</i> , 345 F. Supp. 155 (N.D. Ill. 1972)	18, 34, 38
<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954)	20
<i>Buckley v. Coyle Public School System</i> , 476 F.2d 92 (10th Cir. 1973)	18, 23, 38

III

<i>Bullock v. Carter</i> , 405 U.S. 134 (1972)	8, 11, 20
<i>Butcher's Union v. Crescent City</i> , 111 U.S. 746 (1884) ..	27
<i>Cerra v. East Stroudsburg Area High School District</i> , 299 A.2d 277 (1973)	38
<i>Cohen v. Chesterfield County School District</i> , 474 F.2d 395 (4th Cir. 1973)	18, 38
<i>Cooley v. Board of Education, Waterford Union High School</i> , Dept. Human Relations, Waterford, Wisc., Feb. 1, 1971	39
<i>Dandridge v. Williams</i> , 397 U.S. 471 (1970)	7, 12
<i>Dunn v. Blumstein</i> , 405 U.S. 330 (1972)	8, 12, 20
<i>Eisenstadt v. Baird</i> , 405 U.S. 438 (1972)	29
<i>F.S. Royster Guano v. Virginia</i> , 253 U.S. 412 (1920)	6, 9
<i>Flo v. General Electric Co.</i> , 195 N.Y. 2d 652 (1959)	39
<i>Frontiero v. Richardson</i> , 93 S. Ct. 1764 (1973)	5, 7, 8, 9, 10, 11, 25, 26, 33, 36
<i>Goesaert v. Cleary</i> , 335 U.S. 464 (1948)	9, 10, 11
<i>Graham v. Richardson</i> , 403 U.S. 365 (1971)	7
<i>Green v. Waterford Board of Education</i> , 473 F.2d 629 (2d Cir. 1973)	11, 12, 18, 23, 38
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971)	37
<i>Griswold v. Connecticut</i> , 381 U.S. 478 (1965)	28, 32, 34
<i>Harper v. Virginia Board of Elections</i> , 383 U.S. 663 (1966)	7, 26
<i>Heath v. Westerville Board of Education</i> , 345 F. Supp. 501 (S.D. Ohio 1972)	16, 18-19, 34, 38
<i>Holmes v. Danner</i> , 191 F. Supp. 394 (M.D. Ga. 1961)	35
<i>Hoyt v. Florida</i> , 368 U.S. 57 (1961)	10
<i>Karezewski v. Baltimore & Ohio R.R. Co.</i> , 274 F. Supp. 169 (N.D. Ill. 1967)	9
<i>Korematsu v. United States</i> , 320 U.S. 214 (1944)	24

IV

Kupczyk v. Westinghouse Electric Corp., Case No.	
CSF-152-6-67, March 3, 1969	39
LaFleur v. Cleveland Board of Education, 465 F.2d 1184	
(6th Cir. 1972)	18, 23, 33, 38
Levy v. Louisiana, 391 U.S. 68 (1968)	7
Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61	
(1911)	9
Lochner v. New York, 198 U.S. 45 (1905)	10
Loving v. Virginia, 388 U.S. 1 (1967)	7, 24, 28
Mengelkoch v. Industrial Welfare Commission, 442	
F.2d 1119 (9th Cir. 1971)	9, 10
Meyer v. Nebraska, 262 U.S. 390 (1922)	28
McGowan v. Maryland, 366 U.S. 420 (1960)	7, 9
McLaughlin v. Florida, 379 U.S. 184 (1964)	7, 24, 27
Middletown Board of Education, 56 L.A. 830 (1971)	39
Muller v. Oregon, 208 U.S. 412 (1908)	9, 10, 11
Parolisi v. Board of Examiners of City of New York,	
55 Misc. 2d 546, 285 N.Y.S.2d 936 (Sup. Ct. 1967) ..	16
Patterson Tavern & Grill Owner's Association v. Haw-	
thorne, 57 N.J. 180, 270 A.2d 638 (1970)	10
Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971)	
.....	22, 34
Pocklington v. Duval County School Board, 345 F. Supp.	
163 (M.D. Fla. 1972)	19, 34, 38
Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972)	
.....	8, 11, 20
Reed v. Reed, 404 U.S. 71 (1971)	
.....	5, 7, 8, 9, 10, 13, 18, 20, 25, 33
Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th	
Cir. 1971)	34
Sail'er Inn v. Kirby, 485 P.2d 529 (1971)	9, 10, 25

<i>San Antonio Independent School District v. Rodriguez</i> , 93 S. Ct. 1278 (1973)	11, 19, 20, 21
<i>Schattman v. Texas Employment Commission</i> , 459 F.2d 32 (5th Cir. 1972)	23
<i>Seidenberg v. McSorley's Old Ale House</i> , 317 F. Supp. 593 (S.D. N.Y. 1970)	10
<i>Shapiro v. Thompson</i> , 394 U.S. 618 (1969)	6, 7, 31, 35
<i>Sherbert v. Verner</i> , 374 U.S. 399 (1963)	29
<i>Skinner v. Oklahoma</i> , 316 U.S. 535 (1942)	7, 28
<i>Sprogis v. United Air Lines, Inc.</i> , 444 F.2d 1194 (7th Cir. 1971)	22
<i>Southgate Educational Association & Board of Educa- tion of Southgate Community School District</i> , AAA Case No. 5439-0323071 (Aug. 3, 1971)	39
<i>Stanley v. Illinois</i> , 405 U.S. 645 (1972)	8, 14
<i>State Division of Human Rights v. Board of Education of Union Free School District, No. 22</i> , Case Nos. CS-21025-70, et seq. (June 29, 1971)	38
<i>Takahashi v. Fish & Game Commission</i> , 334 U.S. 410 (1948)	7
<i>Tecumseh Products Co. v. Wisconsin Employment Re- lations Board</i> , 126 N.W.2d 520 (1959)	39
<i>Truax v. Edmonds School District #15</i> , Superior Ct. Snohomish County, Washington, August, 1971, Dkt. #107915	38
<i>Truax v. Raich</i> , 239 U.S. 31 (1915)	10, 27
<i>United States v. Dege</i> , 364 U.S. 51 (1960)	10
<i>United States v. Hayes International Corp.</i> , 415 F.2d 1038 (5th Cir. 1969)	31
<i>Vlandis v. Kline</i> , 93 S. Ct. 2330 (1973)	8
<i>Weber v. Aetna Casualty & Surety Co.</i> , 406 U.S. 164 (1972)	8, 11, 12, 20

VI

<i>Weeks v. Southern Bell Tel. & Tel. Co.</i> , 408 F.2d 228 (5th Cir. 1969)	34
<i>Wieman v. Updegraff</i> , 344 U.S. 183 (1952)	28
<i>Williams v. San Francisco Unified School District</i> , 340 F. Supp. 438 (N.D. Cal. 1972)	18, 19, 34, 38
<i>Williamson v. Lee Optical Co.</i> , 348 U.S. 483 (1955)	9
<i>Yick Wo v. Hopkins</i> , 118 U.S. 356 (1886)	9

Constitutional Provisions

United States Constitution

Fourteenth Amendment	4, 5, 6, 18, 28
----------------------------	-----------------

Statutes

28 U.S.C. § 1254(1)	3
29 U.S.C. § 206(d)	37
42 U.S.C. § 1983	4
42 U.S.C. § 2000e-2	22, 34, 36
Equal Employment Opportunity Act of 1972, P.L. 92- 261, 92nd Cong., H.R. 1746	36

Ohio Revised Code, Chapter 3319:

§ 3319.13	16
§ 3319.16	16

Regulations

3 C.F.R. § 339	37
29 C.F.R. § 1604.10(a)	36
29 C.F.R. § 1604.10(b)	37
41 C.F.R. § 60-20.3(g)	37

VII

Other Authorities

Background Facts on Women Workers, 1970, U.S. Dept. of Labor, Women's Bureau	30
Comment, Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964, 1968 DUKE L.J. 671	23-24
110 Cong. Rec. 13169-72 (1964)	36
Crozier, Constitutionality of Discrimination Based on Sex, 15 B.U.L. REV. 723 (1935)	24
Curran, <i>Equal Protection of the Law: Pregnant School Teachers</i> , 285 NEW ENGLAND J. MD. 336 (1971)	15, 34
Developments in the Law—Equal Protection, 82 HARV. L. REV. 1065 (1969)	7
Eastwood, <i>The Double Standard of Justice: Women's Rights Under the Constitution</i> , 5 VAL. L. REV. 281 (1971)	24
Gunther, <i>In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection</i> , 86 HARV. L. REV. 1 (1972)	8, 12
Johnston & Knapp, <i>Sex Discrimination by Law: A Study in Judicial Perspective</i> , 46 N.Y.U. L. REV. 675 (1971)	24
Love's Labors Lost: <i>New Conceptions of Maternity Leaves</i> , 7 HARV. CIV. RTS. CIV. LIBS. L. REV. 260 (1972)	34
Note, 84 HARV. L. REV. 1499 (1971)	24
Note, <i>Are Sex-Based Classifications Constitutionally Suspect?</i> , 66 NW. U. L. REV. 481 (1971)	24
Note, <i>Fair Employment—Is Pregnancy Alone a Sufficient Reason for Dismissal of a Public Employee?</i> , 52 B.U.L. REV. 196 (1972)	24

VIII

Reich, <i>The New Property</i> , 73 YALE L. J. 733 (1964)	27
Testimony of Andre E. Hellegers, before the Federal Communications Commission, Dec. 1, 1971. In the Matter of Petitions filed by the E.E.O.C., et al., Docket No. 19143	15, 34
Wilks, <i>Memorandum</i> , Dept. of Labor, 1970	37
Women Workers Today, 1970, U.S. Dept. of Labor, Women's Bureau	31

Supreme Court of the United States

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The International Association of Official Human Rights Agencies respectfully moves, pursuant to Rule 42, for leave to file the attached brief *amicus curiae* on behalf of Respondents in this case. Consent of Respondents has been granted; consent of Petitioners has been denied.

The International Association of Official Human Rights Agencies (IAOHRA) is an association of state and local civil rights agencies engaged in identifying and eliminating discrimination on the basis of race, sex, religion, and national origin in the areas of employment, housing, education, and public accommodations. The 87 member agencies and 500 constituent agencies of IAOHRA are

charged with protecting and advancing the cause of human rights by administering and enforcing state and local anti-discrimination laws. The issues raised in this proceeding are similar to issues raised before state and local civil rights agencies, and the decision rendered by this Court will have substantial effect on pending and in futuro cases before these agencies. Reversal of the decision below could result in practices which perpetuate sex discrimination, thereby affecting the enforcement responsibilities of state and local civil rights agencies. Therefore, we respectfully request that this motion for leave to file an *amicus* brief be granted. Filed herewith is our brief as *amicus curiae*.

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COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, reversing the judgment of the United States District Court for the Northern District of Ohio, is reported in 465 F.2d 1184 (1972). The opinion of the District Court is reported in 326 F. Supp. 1208 (N.D. Ohio, 1971).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Sixth Circuit was rendered on July 27, 1972. The Cleveland Board of Education's Motion for a Rehearing *en banc* was denied on August 29, 1972. The Petition for a Writ of Certiorari was filed on November 27, 1972 and granted on April 23, 1973. The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV, § 1 ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTE INVOLVED

Civil Rights Act of 1871, 42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

QUESTION FOR REVIEW

Whether the Cleveland Board of Education's mandatory maternity leave regulation, which requires all pregnant teachers, regardless of ability to continue working, to take an unpaid leave of absence no later than the end of the fourth (4th) month of pregnancy and precludes re-employment until the beginning of a new school semester after the baby is at least three (3) months old, constitutes sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The District Court answered this question, "No." The Court of Appeals reversed and answered, "Yes." *Amicus*

contends the decision of the Court of Appeals should be affirmed.

STATEMENT OF THE CASE

Respondents' statement of the case is hereby adopted.

SUMMARY OF ARGUMENT

The mandatory maternity leave regulation of the Cleveland Board of Education, which forces all pregnant teachers to take an unpaid leave of absence no later than the end of the fourth (4th) month of pregnancy and forbids re-employment with the Board until the commencement of a new school semester after the child is at least three (3) months old, is discrimination based upon sex and violates the Equal Protection Clause of the Fourteenth Amendment.

The regulation, which treats pregnancy differently and more harshly than any other physical condition, should not withstand the reasonableness test of constitutionality because it is arbitrary and lacks any rational relation to a legitimate purpose.

Furthermore, in light of this Court's recent decisions in *Reed v. Reed*, 404 U.S. 71 (1971) and *Frontiero v. Richardson*, 93 S. Ct. 1764 (1973), the regulation, which is based on a suspect classification and interferes with fundamental rights, should be judged under the strict scrutiny test of equal protection and measured by a standard of compelling state interest rather than mere rational basis.

Overwhelming authority supports Respondents' position that, under any standard of review, the regulation violates the Equal Protection Clause of the Fourteenth Amendment.

ARGUMENT

I. THE MANDATORY MATERNITY LEAVE REGULATION OF THE CLEVELAND BOARD OF EDUCATION DISCRIMINATES AGAINST WOMEN EMPLOYEES OF THE BOARD IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Introduction

Section 1 of the Fourteenth Amendment provides, *inter alia*, that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws". This basic constitutional commandment "does not prevent the states from resorting to classification for the purposes of legislation," but does require that "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). In addition, the purpose of the legislation must itself be a constitutionally permissible one. *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969).

In the past, this Court has utilized two distinct standards of review for determining whether a statute or regulation violates the equal protection clause. In cases involving routine regulatory legislation, the test of reasonable classification has been applied: Does the classification bear a reasonable and just relation to a permissible objective? Under this standard, if the purpose of the statute or regulation is a permissible one and if the statutory classification bears the required fair relationship

to that purpose, the constitutional mandate will be held satisfied. *McGowan v. Maryland*, 366 U.S. 420 (1960); *Dandridge v. Williams*, 397 U.S. 471 (1970).

In two types of cases, however, this Court has applied a more stringent test. When the statute or rule affects "fundamental rights or interests," or when the statute or rule classifies on a basis "inherently suspect," the Court will subject the rule to "the most rigid scrutiny" and has held that the classification, to be valid, must "promote a compelling governmental interest," *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (emphasis in original), or serve some "overriding" purpose, *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). See also, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) ("strict scrutiny" required of sterilization law); *Harper v. Virginia Board of Elections*, 383 U.S. 663, 760 (1966) (classifications which "invade or restrain . . . fundamental rights and liberties" must be "closely scrutinized and carefully confined"); *Loving v. Virginia*, 388 U.S. 1, 9 (1967) (statutes imposing racial classifications bear a "heavy burden of justification"); *Levy v. Louisiana*, 391 U.S. 68, 71 (1968) (court is "extremely sensitive" to classifications which affect "basic civil rights"); *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) ("heightened judicial solicitude" is required for certain classes of persons); *Frontiero v. Richardson*, 93 S. Ct. 1764 (1973) (plurality opinion); Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-1132 (1969).

Recent decisions of this Court support the proposition that even as to the more lenient test of "reasonable classification," the standard of inquiry and review is not so deferential to legislative judgment as had been previously supposed. *Reed v. Reed*, 404 U.S. 71 (1971);

Stanley v. Illinois, 405 U.S. 645 (1972). The Court appears to be moving toward a third test—a reconciliation of the traditional two-tier test—by posing certain fundamental inquiries in all equal protection cases. This new intermediate standard requires that the legislation be “closely scrutinized,” and that the proponent of a challenged classification show that it is “necessary to the accomplishment of legitimate [governmental] objectives.” *Bullock v. Carter*, 405 U.S. 134, 144 (1972). See also, *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, 173 (1972); *Police Department v. Mosley*, 408 U.S. 92, 95 (1972); *Reed v. Reed*, *supra*; *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972); *Vlandis v. Kline*, 93 S. Ct. 2330, 2339 (1973) (White, J., concurring); Gunther, *In Search of Evolving Doctrine on a Charging Court: A Model for A Newer Equal Protection*, 86 HARV. L. REV. 1, 17 (1972).

The mandatory maternity leave regulation of the Cleveland Board of Education, which requires female teachers to resign their position no later than the end of the fourth (4th) month of pregnancy and forbids them to return to teaching until the beginning of a regular school semester after the child is at least three (3) months old (A. 54-55), must be held unconstitutional when judged by any of the applicable standards—“strict scrutiny,” reasonableness, or the evolving doctrine of “more closely scrutinized.” However, of these tests, and in light of the recent decision by this Court (*Frontiero v. Richardson*, *supra*) it appears that the proper standard of review to test the constitutionality of the Cleveland Board of Education’s maternity policy should be “strict scrutiny” because the regulation in question classifies on the basis of sex, and this Court has recently held that “. . . [c]lassifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny.” *Frontiero v. Richardson*, *supra* at 1768 (1973).

A. The Regulation Is Unconstitutional Under the Traditional Reasonableness Standard.

The maternity regulation of the Cleveland Board of Education must be held unconstitutional even if only judged by the traditional test of reasonableness. The rule is not reasonable but arbitrary and has no "fair and substantial relation to the object of the legislation," *F.S. Royster Guano Co. v. Virginia*, *supra*. Maternity leave rules, based on unwarranted assumptions and stereotyped characterizations about women are an outdated vestige of a by-gone era when "laws which disabled women from full participation in the political, business and economic arenas . . . [were] . . . characterized as 'protective' and beneficial." *Sail'er Inn v. Kirby*, 485 P.2d 529, 541 (1971). Such laws can no longer be explained on any rational basis. *Karezewski v. Baltimore and Ohio R.R. Co.*, 274 F. Supp. 169 (N.D. Ill. 1967); *Mengelkoch v. Industrial Welfare Commission*, 442 F.2d 1119 (9th Cir. 1971).

Historically, state statutory classifications have been accorded great deference, perhaps because most dealt with economic regulation under a state's police power. *McGowan v. Maryland*, *supra* at 425; *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); *Atchison T. & S.F.R. Co. v. Matthews*, 174 U.S. 96 (1899); *Williamson v. Lee Optical*, 348 U.S. 483 (1955). But the exercise of judicial restraint has never blinded this Court to real inequalities enacted under the guise of reasonableness. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

Petitioners assert that decisions by the Court, prior to *Reed* and *Frontiero*, permit the application of the traditional standard of review in cases of sex discrimination. *Muller v. Oregon*, 208 U.S. 412 (1908); *Goesaert v. Cleary*,

335 U.S. 464 (1948); *Hoyt v. Florida*, 368 U.S. 57 (1961) (Petitioners' Brief, pp. 31-33). In so doing, Petitioners not only ignore the significance of *Reed* and *Frontiero*, but also rest on precedent expressing a view of women that this Court has called "offensive to the ethos of our society." *U. S. v. Dege*, 364 U.S. 51, 53 (1960). *Muller* should be seen in its proper context: turn of the century working conditions when women labored long hours in sweatshop operation. Decided just three years after *Lochner v. New York*, 198 U.S. 45 (1905), *Muller* was brought by an employer challenging the state's police power to legislate in the area of hours of labor and not by a woman employee seeking equal treatment under law. This distinction has been forcefully made by the Court of Appeals for the Ninth Circuit in *Mengelkoch v. Industrial Welfare Commission*, 442 F.2d 1119, 1123 (1971).

Similarly *Goesaert* has lost what vitality it once had. See *Patterson Tavern & Grill Owner's Association v. Hawthorne*, 57 N.J. 180, 270 A.2d 638 (1970); *Seidenberg v. McSorley's Old Ale House*, 317 F. Supp. 593 (S.D. N.Y. 1970); and, most significantly, *Sail'er Inn v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529 (1971), followed in *Frontiero v. Richardson*, *supra*. The starting premise in *Goesaert*—that a state could deny all women opportunity for employment—is questionable given the Court's recognition of the importance of employment. See *Truax v. Raich*, 239 U.S. 31, 41 (1915) (right to work without discrimination on grounds of race or nationality "is of the very essence of the personal freedom and opportunity that is the purpose of the [14th Amendment] to secure").

The Court has never explicitly overruled these old cases because the evolution of equal protection doctrine impliedly has done so. See *Reed v. Reed*, *supra*; *Frontiero v. Richardson*, *supra*. *Reed* and *Frontiero* should be seen as

repudiations of the *Muller* and *Goesaert* line of cases. Petitioners rely on *San Antonio Independent School District v. Rodriguez*, 93 S. Ct. 1278 (1973) to establish the traditional standard of review in the instant case so that they can rely on the foregoing "old" cases. Such an attempt bespeaks Petitioners' refusal to acknowledge the importance of *Frontiero*. Petitioners view *Frontiero* as only a "military" case and the case at bar as only an "educational policy" case, rather than seeing these cases for what they are—instances of sex discrimination.

The maternity rule must certainly fail when judged by the intermediate standard requiring that legislation be "closely scrutinized," and that the proponent of the challenged rule show that it is "necessary to the accomplishment of legitimate [governmental] objectives." *Bullock v. Carter*, *supra*.

In recent decisions, this Court has avoided using terminology which establishes a rigid dichotomy between strict and minimal scrutiny. The Court has "narrowed the linguistic gap between the two standards", *Green v. Waterford Board of Education*, 473 F.2d 629, 633 (2nd Cir. 1973), by posing certain fundamental inquiries applicable to "all" equal protection claims. In *Weber v. Aetna Casualty and Surety Co.*, *supra* at 173 (invalidating a Louisiana workman's compensation law that discriminated against dependent unacknowledged illegitimate children), the Court declared that the "essential inquiry" in all equal protection cases is "[i]nvariably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?" This inquiry was repeated in *Police Department of Chicago v. Mosley*, *supra* at 95 (ordinance that differentiated between types of peaceful picketing on the basis of subject matter held unconstitutional):

"As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." Similarly, in *Dunn v. Blumstein*, *supra* at 335 (invalidating a one year durational residency requirement for voting), Mr. Justice Marshall elaborated the crucial question to be asked in equal protection analysis by developing a three-factor analysis applicable to all varieties of equal protection cases which emphasized that equal protection tests do not have the precision of mathematical formulas but rather represent a "matter of degree." Significantly, his formulation of this analysis in the majority opinion in *Dunn* reiterates the test he advocated in his dissent in *Dandridge v. Williams*, 397 U.S. 471 (1970).

The standard of review established by the foregoing cases indicates that this Court will no longer speculate as to what legitimate state objectives may have been furthered by a challenged classificatory scheme. Rather, it will assess the legislative means in terms of whether the purposes have substantial basis in fact, not merely conjecture. Even more significantly, "the Court's definition of what constitutes the necessary rational relationship between a classification and a legitimate governmental interest seems to have become slightly, but perceptibly, more rigorous." *Green v. Waterford*, *supra* at 633. See also, *Weber v. Aetna Casualty & Surety Co.*, *supra*, at 175: "the inferior classification of dependent unacknowledged illegitimate bears . . . no significant relationship to those recognized purposes . . . which workmen's compensation statutes commendably serve." (Emphasis added)

The standard of more "closely scrutinized" review, sometimes referred to as the "means-focused" rational basis test (*Gunther, supra*), has been explicitly extended to statutes which discriminate on the basis of sex, and

such classifications have been held invalid by this Court. In *Reed v. Reed*, *supra* the Court held unconstitutional an Idaho sex-based classification which gave mandatory preference to men over women in the administration of decedent's estates. Mr. Chief Justice Burger noted that Idaho's stated purpose of reducing the probate court's workload by eliminating the need for a hearing in one class of contests "is not without some legitimacy." However, the Court found "crucial" the question of whether the statute advanced the stated objective "in a manner consistent with the command of the Equal Protection Clause." In holding that it did not, the Court said:

To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment . . . *Reed*, *supra* at 76.

Petitioners have offered two reasons in support of their argument that the maternity regulation is reasonable and properly related to a legitimate purpose: 1) ensuring that only "able-bodied" teachers are presiding over classrooms, and 2) preventing administrative problems which might occur in replacing teaching personnel who take leave of absences (Petitioners' Brief, p. 19).

The facts and logic relied on by the school board to justify the regulation have no basis in fact and are not supported by reasoned analysis. Even assuming that Petitioners' administrative convenience rationale were warranted, it is evident after *Reed* that such a justification is not sufficient for permitting the sex-role stereotyping which exists in a mandatory maternity leave policy. In point of fact, however, Petitioners' asserted rationales for its policy are unwarranted.

In maintaining that the regulation ensures that only "able-bodied" teachers preside over classrooms, Petitioners make unsupportable assumptions. It is the *mandatory* feature of the maternity leave regulation which is being challenged by Respondent. No one questions that a pregnant teacher who is advised by her physician to take a leave of absence for health reasons should have a right to do so. The crucial question is, however, whether a pregnant teacher may be forced to take a leave of absence after the fourth month of pregnancy even if her own doctor would permit her to continue working, and she desires to do so (A. 48-50, 72-73). Further, the issue is whether this teacher should be forced to remain away from her job from eight months to over a year after the birth of her child, thereby losing wages, pension, insurance, and seniority rights.

As this Court has recognized, resort to group stereotype as a basis for legislative line-drawing is wholly at odds with the principle of equality of individuals before the law. In striking down an Illinois statute which mandated the presumption that an unwed father was not entitled to the same custody rights of his natural children as their natural mother, this Court stated that:

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand. *Stanley v. Illinois*, 405 U.S. 645 (1972).

The maternity regulation challenged in this case resorts to group stereotyping by treating pregnancy on a

generic basis and imposing the same requirements on all pregnant teachers regardless of their individual differences or abilities. Expert medical opinion has established that no two pregnancies are identical. Curran, *Equal Protection of the Law: Pregnant School Teachers*, 285 NEW ENGLAND J. MD. 336 (1971); Testimony of Andre E. Hellegers, M.D., *In the Matter of Petitions filed by EEOC, et al.*, Docket No. 19143, Federal Communications Commission (1971). Expert medical witnesses of both parties in the instant case agreed that pregnancy required individualized treatment and no medical rule required all pregnant women to leave work several months prior to childbirth (A. 91-93, 121, 124, 128, 148-149, 156). The rule in question imposes disabilities upon an individual female teacher which may far exceed any disabilities inherent in her pregnancy. In considering a similar maternity regulation, a United States District Court had this to say:

It is the very inflexibility of the Board's policy which casts a light of dubious constitutionality about its regulations. Pregnancies, like law suits, are *sui generis*. While there are certain general similarities between each pregnancy, no two are entirely identical. While it may be quite true that some women are incapacitated by pregnancy and would be well advised to adopt regimens less strenuous than those borne by school teachers, to say that this is true of all women is to define that half of our population in stereotypical terms and to deal with them artificially. Sexual stereotypes are no less invidious than racial or religious ones. *Phillips v. Martin-Marietta Corporation*, 400 U.S. 542, 91 S. Ct. 496, 27 L. Ed. 2d 613 (1971); *Sprogis v. United Air Lines, Inc.*, 444 F. 2d 1194 (7th Cir., 1971). Any rule by an employer that seeks to deal with all pregnant employees in an identical fashion is dehu-

manizing to the individual women involved and is by its very nature arbitrary and discriminatory. *Heath v. Westerville Board of Education*, 345 F. Supp. 501, 505 (1972).

Nor are there any distinct characteristics of pregnancy that warrant treating it as a special condition not entitled to the benefits given other temporary medical conditions; yet, the Board of Education has no mandatory leave policy for any other temporary medical condition (A. 206-207). Rather, other conditions are treated under the rubric "sick leave" on an individual basis which considers the teacher's ability to function in the classroom¹ (A. 179-180, 206). Certainly a mere increase in weight and change in physical shape are not, by definition, disabilities which should raise the presumption that a pregnant school teacher is not able-bodied. See *Parolisi v. Board of Examiners of City of New York*, 55 Misc. 2d 546, 285 N.Y.S.2d 936 (Sup. Ct. 1967), holding that the dismissal of a teacher for obesity was arbitrary since the condition did not impair her ability to teach.

The maternity policy also bears no rational relationship to Petitioners' asserted justification of minimizing administrative problems that might occur in replacing pregnant teachers in the classroom (Petitioners' Brief, pp.

1. The Cleveland Board of Education is empowered by statute (Ohio Revised Code, Section 3319.13) to demand that an ill or disabled teacher take a leave of absence. Teachers whose livelihood is threatened by unrequested and undesired leave may present evidence of ability to work at hearing conducted in accordance with basic procedural due process safeguards (Ohio Revised Code, Section 3319.16). But when a teacher becomes pregnant, no showing of incompetency is necessary to terminate her employment. Indeed, her competency to teach is never questioned. Rather, Petitioners arbitrarily classify all women who have reached their fifth month of pregnancy as being incapable of teaching, force the teacher to take an extended unpaid leave, and label the policy "maternity leave."

11-12; A. 198-199). While continuity of instruction may be an important value, a pregnant teacher who provides the Board with a date for beginning her leave preserves that value. A teacher who takes a leave of absence due to a sudden illness disrupts the continuity of teaching even more than a woman who takes a planned leave of absence because of pregnancy. Moreover, where a teacher has a serious, even terminal, illness or an operable illness that will necessitate the teacher missing time from work, the problems of finding a suitable replacement and arranging for the continuity of classroom programs are the same for the School Board as when a teacher is pregnant. Yet, in such cases, unlike pregnancy, there are no regulations requiring the teacher to leave five months before the operation (A. 206-207). The teacher may remain until he can no longer function effectively in the classroom. Any benefits of the challenged rule flow from the fact that the school has advance notice of the teacher's departure—not from the fact that the rule requires such departure after a certain month of pregnancy (A. 206). The School Board is more likely to have notice, and time to deal with administrative problems when the teacher is pregnant than when absence is caused by an accident or illness. The fact that childbirth is a determinable event gives that element of "predictability" that Petitioners might argue is so necessary to their job of replacement. Indeed, the disruption of the educational process would be reduced, not increased, if those teachers willing to work beyond four months were permitted to do so. Strict application of the maternity rule will often *cause* the very interruption Petitioners contend it was designed to prevent. In the case at bar, for example, Petitioners' policy forced Respondent to leave in the middle of the school year rather than complete the semester with her class (A. 53).

In a case challenging a similar maternity regulation, the United States District Court for the Northern District of California considered both the problem of replacing teachers and the problem of classroom disruption. The court stated:

The District's present administrative apparatus seems entirely adequate to cope with such situations, particularly since the use of substitutes is a common and widespread practice. Most onsets of illness, unlike pregnancy, result in employee absences with far less advance notice than is the case with pregnancy, and such other illnesses may result in absences for longer periods than are required for normal pregnancies. It is for just such contingencies that the District has made provision for a pool of qualified substitutes available as temporary replacements on short notice. *Williams v. San Francisco Unified School District*, 340 F. Supp. 438, 445 (N.D. Cal. 1972)

Following its decision in *Reed v. Reed*, *supra*, this Court should declare the mandatory maternity leave policy of the Cleveland Board of Education unconstitutional in light of the Fourteenth Amendment's mandate of Equal Protection. The United States Court of Appeals for the Sixth Circuit, following *Reed*, reached this conclusion in the opinion below. *LaFleur v. Cleveland Board of Education*, 465 F.2d 1184 (6th Cir. 1972). Similar results occurred in the Court of Appeals for the Second Circuit (*Green v. Waterford Board of Education*, *supra*) and the Tenth Circuit (*Buckley v. Coyle Public School System*, 476 F.2d 92 (10th Cir. 1973)) *Contra*, *Cohen v. Chesterfield County School District*, 474 F.2d 395 (4th Cir. 1973).

Federal District Courts faced with this issue have also concurred: *Bravo v. Board of Education of the City of Chicago*, 345 F. Supp. 155 (N.D. Ill. 1972); *Heath v. Wester-*

ville Board of Education, 345 F. Supp. 501, 505 (S.D. Ohio 1972); *Williams v. San Francisco Unified School District*, 340 F. Supp. 438, 443 (N.D. Cal. 1972); *Pocklington v. Duval County School Board*, 345 F. Supp. 163 (M.D. Fla. 1972).

Petitioners' rule has no rational basis in fact; it may actually thwart the goal Petitioners assert they seek. The mandatory leave policy for pregnant teachers must be viewed for what it truly is, an anachronism premised on sex discrimination, and nothing more (A. 173, 176).

B. The Regulation Is Unconstitutional Under the Traditional Rational Basis Standard as Applied in *Rodriguez*.

Petitioners assert that this Court's recent decision in *San Antonio Independent School District v. Rodriguez*, 93 S. Ct. 1278 (1973), requires that the traditional standard of review in equal protection cases be applied in determining the constitutionality of their maternity regulation because their regulation is "educational policy." *Rodriguez* can readily be distinguished from the case at bar; but even if Petitioners' argument that the maternity rule in the instant case should be judged by the traditional standard of review is accepted, the maternity regulation would still be unconstitutional as it is arbitrary and bears no rational relationship to a legitimate goal.

The issue in the instant case involves a classification based on sex in the area of employment; *Rodriguez*, on the other hand, involves the complex issues of taxation, federalism, and educational policy. The cases are similar only in that they both concern school systems.

According to Petitioners, *Rodriguez* reverts to a minimal scrutiny, "hands off," standard of review, thereby

raising anew the problems inherent in the rigid two-tiered equal protection analysis. Not only does this argument construe *Rodriguez* simplistically; it ignores recent decisions developing the rational "means-focused" test. *Reed v. Reed*, *supra*; *Bullock v. Carter*, *supra*; *Weber v. Aetna Casualty and Surety Co.*, *supra*; *Dunn v. Blumstein*, *supra*; *Police Department of Chicago v. Mosley*, *supra*.

This Court has not hesitated to decide equal protection issues raised in the field of education (e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954)), but the Court indicated it viewed *Rodriguez* as something different than one more in a long line of education cases. It found that in significant aspects the case was "*sui generis*" and hence could not be "so neatly fitted into the conventional mosaic of constitutional analysis under the Equal Protection Clause." *Rodriguez*, *supra* at 1288. As Mr. Justice Powell, writing for the majority, framed the issue:

This case represents far more than a challenge to the manner in which Texas provides for the education of its children. We have here nothing less than a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues. We are asked to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests. In so doing, appellees would have the Court intrude in an area in which it has traditionally deferred to state legislatures. *Rodriguez*, *supra*, at 1300.

It has deferred in the past, said the Court, and should continue to do so, because "the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues." *Rodriguez*, *supra* at 1301.

In addition to traditional deference for state fiscal policies and the resulting implications for the concept of federalism (*Rodriguez, supra* at 1302), *Rodriguez* also involved a unique issue of educational policy: the unsettled and controversial question of whether there is any correlation between educational expenditure and educational quality. The correlation—or lack of it—is a matter of considerable dispute among educators and also the basis underlying virtually every legal issue in *Rodriguez*; therefore, the Court was especially unwilling to impose on the state of Texas any constitutional restraints in this area (*Rodriguez, supra* at 1301-02).

The difficult questions of local taxation, fiscal planning, federalism, and education policy appropriately counseled a more restrained standard of review in *Rodriguez*; and although the instant case does present to this court a legislative classification, it does not do so “in a *Rodriguez* situation.” (Petitioners’ Brief, p. 3).

II. THE MANDATORY MATERNITY LEAVE REGULATION OF THE CLEVELAND BOARD OF EDUCATION SHOULD BE JUDGED BY THE STRICT SCRUTINY STANDARD OF EQUAL PROTECTION.

A. The Regulation Is a Sex-Based Classification.

Sex is a suspect classification which should trigger the Court’s special scrutiny. The initial obstacle to this argument is the assertion by petitioners that the regulation in question is not a classification based on sex but rather a classification based on pregnancy (Petitioners’ Brief, pp. 23-25). Without question, pregnancy is a sex-

linked characteristic and it is clear that a rule based on pregnancy is a sex-based rule. Chief Judge Brown of the United States Court of Appeals for the Fifth Circuit has best treated this issue:

The distinguishing factor seems to be motherhood. . . . The question then arises: Is this sex-related? To the simple query the answer is just as simple: Nobody—and this includes Judges, Solomonic and life-tenured—has yet seen a male mother. A mother, to oversimplify the simplest biology, must then be a Woman. *Phillips v. Martin-Marietta*, 416 F.2d 1257, 1259 (5th Cir. 1969) (C.J. Brown dissenting).

The *Phillips* case arose under Title VII of the 1964 Civil Rights Act (42 U.S.C. §§2000(e) *et seq.*). This Court agreed with Chief Justice Brown and held that a rule designating one hiring policy for women and a different one for men, when both had pre-school age children, violated Title VII. *Phillips v. Martin-Marietta Corporation*, 400 U.S. 542 (1971).

Neither can Petitioners logically argue that the maternity rule is not a sex-based classification because the rule does not affect all women at any one time. Again, it is clear that the rule affects women, and only women, since the policy is based on a patently feminine condition, biologically possible only in the female sex. Sex is thus a definitional element in employment disqualification.

Nor does the fact that the policy cannot apply to men prevent it from being discriminatory. As the Court of Appeals for the Seventh Circuit noted: "Discrimination is not to be tolerated under the guise of physical properties possessed by one sex." *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971).

A regulation designed to restrict the employment rights of pregnant teachers can only be viewed as a regulation which restricts the employment rights of women as a sex. As stated by Judge Wisdom, dissenting in *Schattman v. Texas Employment Commission*, 459 F.2d 32 (5th Cir. 1972), "Female employees are the only employees . . . who become pregnant; it follows that they are provisionally dismissed from work on account of their sex. . ." 459 F.2d at 42.

The Court below, in the instant case, noted: "Here, too, we deal with a rule which is inherently based upon a classification by sex. Male teachers are not subject to pregnancy, but they are subject to many types of illnesses and disabilities." *LaFleur v. Cleveland Board of Education*, 465 F.2d 1184 (6th Cir. 1972). Similarly the Court of Appeals for the Tenth Circuit concluded that a mandatory maternity leave "penalizes the feminine school teacher for being a woman . . ." *Buckley v. Coyle Public School System*, 476 F.2d 92 (10th Cir. 1973). See also, *Green v. Waterford Board of Education*, 473 F.2d 629 (2nd Cir. 1973).

Legal scholars have also recognized that a maternity leave policy discriminates on the basis of sex because the policy is based on a condition peculiar to one sex:

Where a woman who is capable of performing her job is discharged or compelled to take a leave of absence because she is pregnant, sex discrimination has occurred; she has been eliminated on the basis of a physical condition peculiar to her sex. The situation is no different than where a capable man is eliminated because of a condition peculiar to men, such as spermatorrhea or red-green color blindness. Comment, *Sex Discrimination in Employment: An At-*

tempt to Interpret Title VII of the Civil Rights Act of 1964, 1968 DUKE L.J. 671, 722.

See also, Crozier, *Constitutionality of Discrimination Based on Sex*, 15 B.U.L. REV. 723, 727-28 (1935); Eastwood, *The Double Standard of Justice: Women's Rights Under the Constitution*, 5 VAL. L. REV. 281, 296-97 (1971); Johnston & Knapp, *Sex Discrimination, by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675, 738-41 (1971); Note, *Are Sex-Based Classifications Constitutionally Suspect?*, 66 NW. U.L. REV. 481 (1971); Note, 84 HARV. L. REV. 1499 (1971); Note, *Fair Employment—Is Pregnancy Alone a Sufficient Reason For Dismissal of a Public Employee?*, 52 B.U.L. REV. 196 (1972).

Thus, a rule based on pregnancy is in fact a sex-based classification. The question, then, is whether sex is a "suspect" classification which will trigger the Court's special scrutiny.

This Court has long recognized that classifications based on race, national origin, and alienage are "suspect" and thus subject to the "strict scrutiny" test of Equal Protection:

all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . and courts must subject them to the most rigid scrutiny. *Korematsu v. United States*, 320 U.S. 214, 216 (1944).

See also, *Bolling v. Sharpe*, 347 U.S. 497 (1954); *McLaughlin v. Florida*, 379 U.S. 134 (1964); *Loving v. Virginia*, 388 U.S. 1 (1967).

Legal precedent has been established for regarding sex as a suspect category and subjecting classifications based on sex to the "compelling governmental interest" test of constitutionality. The classic examples of suspect

classifications which have invoked the strict scrutiny of courts are race, alienage and national origin. The common trait of race, alienage, national origin and sex-based classifications is immutability—members of the group are locked into their status by an accident of birth. Thus, the criteria for defining a suspect classification must certainly turn on the inability of an individual to change his or her status; for it is unjust to classify an individual on the basis of a congenital and unalterable trait over which he or she has no control, thereby, giving credence to the stigma of inferiority which usually attaches to such classifications. *Frontiero v. Richardson*, *supra*; *Sail'er Inn v. Kirby*, *supra*.

Recently, holding unconstitutional a military dependency statute which classified on the basis of sex, this Court held sex to be a suspect basis of classification and noted that "this departure from 'traditional' rational basis analysis with respect to sex-based classifications is clearly justified" *Frontiero v. Richardson*, 93 S. Ct. 1764 (1973). Citing support for such an approach in the unanimous decision of *Reed v. Reed*, 404 U.S. 71 (1971), the plurality opinion in *Frontiero*, delivered by Justice Brennan, declares with unmistakable clarity that legislative classifications premised on unalterable sex characteristics which accord males and females different treatment solely on the basis of sex are inherently suspect and must be subjected to strict judicial scrutiny:

... since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the member of a particular sex because of their sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility. ... And what differ-

entiate sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria is that the sex characteristic frequently bears no relation to ability to perform or to contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members. *Frontiero, supra*, at 1770.

Petitioners' mandatory maternity leave regulation classifies on the basis of sex and must be judicially reviewed under the test of strict scrutiny; Petitioners can only justify this regulation as one necessitated by a compelling governmental interest. We submit that Petitioners are unable to justify their regulation under the more lenient test of reasonableness and certainly cannot justify the rule on the basis of a compelling governmental interest.

B. The Regulation Abridges Respondents' Fundamental Constitutional and Civil Rights.

Not only is sex a suspect classification, but the challenged maternity regulation also abridges a number of Respondents' fundamental rights and liberties. Classifications which invade or restrain such rights must be closely scrutinized and carefully confined. *Harper v. Virginia State Board of Elections, supra*. A regulation which denies constitutionally protected freedom and is based upon a suspect classification must bear a heavy burden of justification and should be upheld only if it is both necessary to and based on a compelling governmental interest, not merely rationally related to the accomplishment of a per-

missible state policy. *McLaughlin v. Florida, supra*. Petitioners have contravened both Respondents' right to work at their chosen profession and their right to bear children; thus, the appropriate standard of review in this case must be strict judicial scrutiny.

Although the Supreme Court has never specifically defined what constitutes a "fundamental right," the right to work at one's chosen profession as well as the right to bear children, must surely both be included within that concept. The opportunity to earn a living is a right fundamental to the enjoyment of all other rights of life and liberty. As Professor Charles Reich stated in *The New Property* (73 YALE L.J. 733, 738 (1964)):

... today more and more of our wealth takes the form of rights or status rather than tangible goods. An individual's profession or occupation is a prime example. To many others, a job with a particular employer is the principle form of wealth. A profession or a job is frequently far more valuable than a house or bank account, for a new house can be bought, and a new bank account created, once a profession or job is secure.

Since 1884, in *Butcher's Union v. Crescent City*, 111 U.S. 746 (1884), this Court has declared that the right to follow any of the common occupations of life "is an inalienable right . . . formulated in the Declaration of Independence . . . a large ingredient of the civil liberty of the citizen." This holding was affirmed in *Truax v. Raich*, 239 U.S. 33, 41 (1915) when the Court stated:

It requires no argument to show that the right to work for a living in the common occupation of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure.

The right to work is of special importance and should bear strictest scrutiny when it involves teachers. The concept of the special role and responsibilities of teachers is set forth in *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J. concurring):

To regard teachers . . . in our entire educational system, from the primary grades to the university . . . as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry, which alone makes for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere they generate. . . .

Since teachers play this special role in our society, the forced removal of pregnant teachers from the classroom demonstrates to students the very type of discrimination, based on Victorian stereotypes and lack of knowledge, that education should lead students to reject.

The Court has clearly indicated that it will protect the marital relationship and its important procreative function from interference by the state. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1922) ("right of the individual . . . to marry, establish a home and bring up children" is an essential part of liberty guaranteed by Fourteenth Amendment); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (right to bear children "fundamental" and sterilization statute must be viewed with "strict scrutiny"); *Loving v. Virginia*, 388 U.S. 1, 5 (1967) (right to marry a basic civil right and miscegenation statute must be subject to "the most rigid scrutiny"); *Griswold v. Connecticut*, 381 U.S. 478, 481 (1965) (Connecticut law prohibiting the use of

contraceptives invalidated because it interfered with "a right of privacy older than the Bill of Rights, older than our political parties, older than our school system"); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972): "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (Emphasis original).

Although these cases concern outright prohibitions on constitutionally protected rights, similar strict judicial scrutiny has been applied to regulations which condition or burden the exercise of the same protected rights. *Sherbert v. Verner*, 374 U.S. 399 (1963). The *Sherbert* case concerned a denial of unemployment compensation to a member of the Seventh-Day Adventist Church who refused to take a job which required working on Saturday, the Adventist Sabbath. In response to the state's argument that there had been no deprivation of freedom of religion, the Court held that conditioning or burdening the exercise of a constitutional right was unconstitutional, just as the outright deprivation of that protected right would be.

As in *Sherbert*, the effect of the Cleveland Board of Education's mandatory maternity leave policy is to seriously burden and condition the exercise of fundamental constitutional rights. A teacher who is four months pregnant is forced by the rule to give up her profession, even though she may be perfectly capable of continuing her work. Conversely, those teachers who are unwilling or ineligible to take an extended unpaid leave of absence are effectively deterred by the rule from bearing children. In effect, the rule forces female employees of the Board of

Education to give up one constitutional right in order to exercise another: If women wish to exercise their right to work, they must relinquish their right to have children. Since no male employee of the Board of Education is ever required to choose between these two fundamental constitutional rights, the Board is clearly discriminating against its female employees by forcing this choice upon them.

It is the *combined effect* of a rule based on a suspect classification (*i.e.* sex) which affects areas involving fundamental constitutional rights (*i.e.* work, marital privacy) that clearly indicates the appropriateness and necessity of the court applying strict scrutiny in determining the validity of the challenged rule.

The full impact and importance of discrimination based on sex which affects a fundamental interest such as employment can be seen by examining the situation of pregnant women who are forced to leave employment while they are still able to work. Some are the principal providers in a family where the husband is not working; others are not married or have been abandoned. A woman dismissed from a job because of pregnancy may be found ineligible for unemployment compensation and may be forced to resort to far more strenuous work in order to provide for herself and her family.

Statistics prove that society's ill-considered efforts to protect women (based on Victorian stereotypes and not factual evidence) actually do them more harm than good. Women's median annual earnings are only about 3/5 of men's—\$4,457 and \$7,664 respectively (*Background Facts on Women Workers*, 1970 U. S. Department of Labor, Women's Bureau). Much of the difference is accounted for by occupational distribution in the types and levels of jobs offered to women; but a substantial part of the gap

may reflect the real job discrimination that women suffer because of their dual roles as workers and mothers. The lowest participation of women in the labor force occurs during their childbearing and childrearing years (*Women Workers Today*, 1970, U. S. Dept. of Labor, Women's Bureau). For some women this is by preference; but for many it is the result of sex-based discriminatory rules regarding maternity leave. Women, whose salaries are vital to family income, are forced out of the labor market, while they are still able and willing to work, simply because they are pregnant.

It is undeniably clear that the manner in which a working woman's pregnancy is treated, both legally and economically, profoundly affects her entire career. Surely, it is beneficial to employers and to society as a whole to enable the valuable underutilized workforce of women to fully participate in and contribute to the labor market. cf., *United States v. Hayes International Corp.*, 415 F.2d 1038, 1045 (5th Cir. 1969). It is inescapable that sex bias takes a huge economic toll and that unreasonable maternity policies, such as the one in the case now before the Court, constitute a crucial element of sex discrimination in employment.

The Cleveland Board of Education's maternity regulation, which is premised on the suspect classification of sex and infringes upon fundamental constitutional rights must bear a heavy burden of justification. To be valid, Petitioners must show that the regulation promotes a "compelling governmental interest" (*Shapiro v. Thompson*, *supra* at 634).

C. No Compelling Governmental Interest Is Served by Petitioners' Regulation.

In assessing evidence presented by the School Board in support of the mandatory maternity leave regulation, it should be noted that in an area touching on constitutional rights, regulation must extend no further than required by the situation at hand. As this Court said in *Griswold v. Connecticut*, *supra* at 498:

... it is clear that the State interest in safeguarding marital fidelity can be served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples. See *Aptheker v. Secretary of State*, 378 U.S. 500, 514; *NAACP v. Alabama*, 377 U.S. 288, 307-308; *McLaughlin v. Florida*, 379 U.S. 184, 196. Here, as elsewhere, "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438.

The Petitioners must therefore demonstrate two things: Not only that the regulation regarding maternity leave is needed, but also that the specific provisions of the present maternity rule are required.

Petitioners have offered two reasons to support the validity of their maternity regulation: 1) concern that only "able-bodied" teachers preside over classrooms; and 2) prevention of administrative problems which might occur in replacing teachers who take leaves of absence. A full discussion of these justifications and the failure of Petitioners to prove even any reasonable relationship be-

tween the rule, the justification for the rule, and the effect of the rule has been discussed in Part I of this Brief.

The regulation challenged in this case and the statutes challenged in *Frontiero* and *Reed* all purported to serve the end of administrative convenience. Yet, administrative convenience was precisely the rationale held insufficient for sex-based classifications in *Frontiero* and *Reed*:

[A]lthough efficacious administration of governmental programs is not without some importance, 'the constitution recognizes higher values than speed and efficiency.' *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) . . . [In] the realm of 'strict judicial scrutiny' . . . any statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very' kind of arbitrary legislative choice forbidden by the [Constitution]. . . . ' *Reed v. Reed*, *supra*, at 76, 77. *Frontiero*, *supra*, at 4613.

Petitioners have utterly failed to provide any tenable administrative justification for the regulation, nor have they produced data to support their speculative arguments concerning the physical incapacity of all pregnant teachers. *LaFleur v. Cleveland Board of Education*, 465 F.2d 1184 at 1187 and 1188 (6th Cir. 1972).

The school board can give no rational argument for choosing the time of four months instead of some other period (Petitioners' Brief, p. 20; A. 119, 173, 176). Indeed, similar maternity leave regulations discussed in other cases have exhibited a variety of dates at which a pregnant teacher is compelled to discontinue her work. See,

e.g., *Bravo v. Board of Education of the City of Chicago*, 345 F. Supp. 155 (N.D. Ill. 1972) (after four months); *Pocklington v. Duval County School Board*, 345 F. Supp. 163 (M.D. Fla. 1972) (after four and one-half months); *Heath v. Westerville Board of Education*, 345 F. Supp. 501 (S.D. Ohio 1972) (after five months); *Williams v. San Francisco Unified School District*, 340 F. Supp. 438 (N.D. Cal. 1972) (after seven months). Not only have various school boards treated pregnancy differently, but expert medical opinion has established that no two pregnancies are alike. See Curran, *Equal Protection of the Law: Pregnant School Teachers*, 285 NEW ENGLAND J. MD. 336 (1971); *Love's Labors Lost: New Conceptions of Maternity Leaves*, 7 HARV. CIV. RTS. CIV. LIBS. L. REV. 260 (1972); Testimony of Andre E. Hellegers, M.D., *In the Matter of Petitions filed by the E.E.O.C., et al.*, Docket No. 19143, Federal Communications Commission (1971). That the Cleveland Board of Education would treat all pregnancies alike indicates the impermissible overbreadth of their regulation. See, *Griswold*, *supra* at 498.

There is no basis in fact to justify the challenged rule based on a concern for "able-bodied" teachers; but even if it were arguably true, that justification cannot amount to a compelling governmental interest. There has been a growing recognition at the Federal level (embodied by Congress in enacting Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000(e) *et seq.*) that it is no longer the legitimate business of a state, or any of its political subdivisions, to protect women by legislation which in fact discriminates against them in the field of employment. *Phillips v. Martin-Marietta Corp.*, *supra*; *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Weeks v. Southern Bell Tel. and Tel. Co.*, 408 F.2d 228 (5th Cir. 1969).

Nor does any factual justification exist for the challenged rule premised on the administrative inconvenience that might be caused by replacing pregnant teachers. Even assuming any disruption is caused by departing pregnant teachers, under the strict scrutiny standard the disruption necessary to amount to compelling interest must rise to the level of making a school system inoperable. *Holmes v. Danner*, 191 F. Supp. 394 (M.D. Ga. 1961), *cf.*, *Shapiro v. Thompson*, *supra*. Petitioners do not argue that their school system would become inoperable if the maternity regulation were to be struck down as unconstitutional; they merely argue that striking down the rule would result in some administrative burdens. The rule itself causes these minor problems.

Whether the purpose of the School Board's mandatory maternity leave regulation is to insure "able-bodied" teachers in the classroom or whether its purpose is to minimize any disturbance of classroom programs caused by a teacher's departure, Petitioners have failed to demonstrate any "compelling governmental interest" in support of that policy.

III. SIGNIFICANT AUTHORITY SUPPORTS RESPONDENTS' POSITION THAT MANDATORY MATERNITY LEAVE REGULATIONS ARE DISCRIMINATORY.

The overwhelming authority among courts and governmental agencies considering mandatory maternity leave policies has declared them invalid. While it is recognized that this Court is not bound by decisions of other courts and agencies, their rationale and pervasiveness are worthy of consideration.

In *Frontiero v. Richardson*, *supra* at 1771 the Court noted:

[C]ongress has itself concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration.

The Court in *Frontiero* was referring to Title VII of the Civil Rights Act of 1964 which provides that no employer, labor union or other organization subject to the provisions of the Act shall discriminate against any individual on the basis of "race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2. Public employees, such as Respondents, were specifically exempted from Title VII coverage when the Act was first passed because it was assumed that the Fourteenth Amendment afforded them the same protection as private employees would receive under Title VII (110 Cong. Rec. 13169-72, May 9, 1964). After passage of the Act, the need to provide specific protection to public employees became increasingly clear; Title VII was amended to extend coverage to public employees (P.L. 92-261, March 24, 1972). Thus Title VII emerges as the federal congressional embodiment of a policy designed to combat discrimination; the Equal Protection Clause of the Fourteenth Amendment is the constitutional embodiment of that same policy.

On April 5, 1972, the Equal Employment Opportunity Commission, the administrative agency charged with enforcement of Title VII, adopted guidelines which declared that exclusion of employees "from employment . . . because of pregnancy is a *prima facie* violation of Title VII." (29 C.F.R. § 1604.10(a)), and required employers to treat disabilities of pregnancy and childbirth like other tem-

porary medical disabilities (29 C.F.R. § 1604.10(b)). These guidelines prohibit the maternity policy utilized by the Cleveland Board of Education in the instant case.

The significance of the Commission's guidelines was pointed out by this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971): "[t]he administrative interpretation of the Act by the enforcing agency is entitled to great deference. . . ." Since the Act and its legislative history support the Commission's construction, it is reasonable to construe the guidelines as expressing the will of Congress.

Similar congressional prohibition against sex-based discrimination is contained in the Equal Pay Act of 1963. 29 U.S.C. § 206(d) provides that no employer covered by the Act "shall discriminate between employees on the basis of sex."

The Executive branch and other governmental agencies have taken the same position. The Office of Federal Contract Compliance of the U. S. Department of Labor has issued interpretative guidelines for enforcing Executive Order 11246 (3 C.F.R. 339) which prohibits sex discrimination by employers holding federal contracts. The Sex Discrimination Guidelines provide, in part, that "Women shall not be penalized in their conditions of employment because they require time away from work on account of child-bearing." 41 C.F.R. 60-20.3(g). Further interpretations of the guidelines state that the time when maternity leave shall begin is primarily a medical decision to be made by the pregnant employee and her physician. Wilks, *Memorandum*, Department of Labor, 1970.

Federal Courts of Appeals, considering this issue have overwhelmingly supported Respondents' view that mandatory maternity leaves are violative of the equal protection

clause. *LaFleur v. Cleveland Board of Education*, 465 F.2d 1184 (6th Cir. 1972); *Green v. Waterford Board of Education*, 473 F.2d 629 (2nd Cir. 1973); *Buckley v. Coyle Public School System*, 476 F.2d 92 (10th Cir. 1973); *Contra, Cohen v. Chesterfield County School District*, 474 F.2d 395 (4th Cir. 1973).

Federal District Courts faced with this issue have also concurred: *Bravo v. Board of Education of the City of Chicago*, 345 F. Supp. 155 (N.D. Ill. 1972); *Heath v. Westerville Board of Education*, 345 F. Supp. 501 (S.D. Ohio 1972); *Williams v. San Francisco Unified School District*, 340 F. Supp. 438 (N.D. Cal. 1972); *Pocklington v. Duval County School Board*, 345 F. Supp. 163 (M.D. Fla. 1972).

The same result has been reached by a number of rulings based on state law. For example, the Commissioner, New York State Division of Human Rights, has ruled that a regulation requiring teachers to take a leave of absence after the fourth month of pregnancy and to remain on leave until at least six months after the birth of the child was discrimination based on sex. *State Division of Human Rights v. Board of Education of Union Free School District No. 22*, Case Nos. CS-21025-70, et seq. (June 29, 1971). Accord: *Awadallah v. New Milford Board of Education*, N.J. Dept. Law and Public Safety, Sept. 29, 1971; *Blair v. New Milford Board of Education*, No. E02ES-5337 (Sup. Ct. Hackensack, N.J., Jan. 20, 1971); *Truax v. Edmonds School District #15*, Superior Ct. Snohomish County, Washington, August 1971, Dkt. #107915. *Contra, Cerra v. East Stroudsburg Area School District*, 299 A.2d 277 (1973).

Similarly, the Wisconsin Department of Industry, Labor and Human Relations has made an interpretive ruling of that state's law dealing with sex discrimination.

They held that the time when a woman leaves before child-bearing is a matter between the employee and her doctor. They assured to women who require time away from work for maternity purposes the same working conditions or privileges as employees who require a temporary work interruption for any other medically related reason. *Cooley v. Board of Education, Waterford Union High School, Department Human Relations, Waterford, Wisc. February 1, 1971. Accord: Kupczyk v. Westinghouse Electric Corporation, Case No. CSF-152-6-67, March 3, 1969.*

Labor arbitration decisions have also concurred in the holding that mandatory maternity leave policies amount to sex discrimination "without the constitutionally required rational basis." An arbitrator in Michigan held that a rule which required teachers to leave in their fifth month of pregnancy was arbitrary and discriminatory and resulted in substantial financial hardship. As a result the teacher was awarded lost salary, costs for lost insurance benefits and automatic restoration to her former position. *Southgate Educational Association and Board of Education of Southgate Community School District, AAA Case No. 5439-0323071 (August 3, 1971). Accord: Middletown Board of Education, 56 L.A. 830, 832 (1971); Flo v. General Electric Company, 195 N.Y.2d 652 (1959); Tecumseh Products Co. v. Wisconsin Employment Relations Board, 126 N.W.2d 520 (1959).*

Amicus respectfully urges this Court to give great weight to these persuasive authorities and to declare Petitioners' mandatory maternity leave regulation unconstitutional.

CONCLUSION

It is respectfully submitted that for the foregoing reasons, the judgment of the United States Court of Appeals for the Sixth Circuit, rendered July 27, 1972, should be affirmed.

Respectfully submitted,

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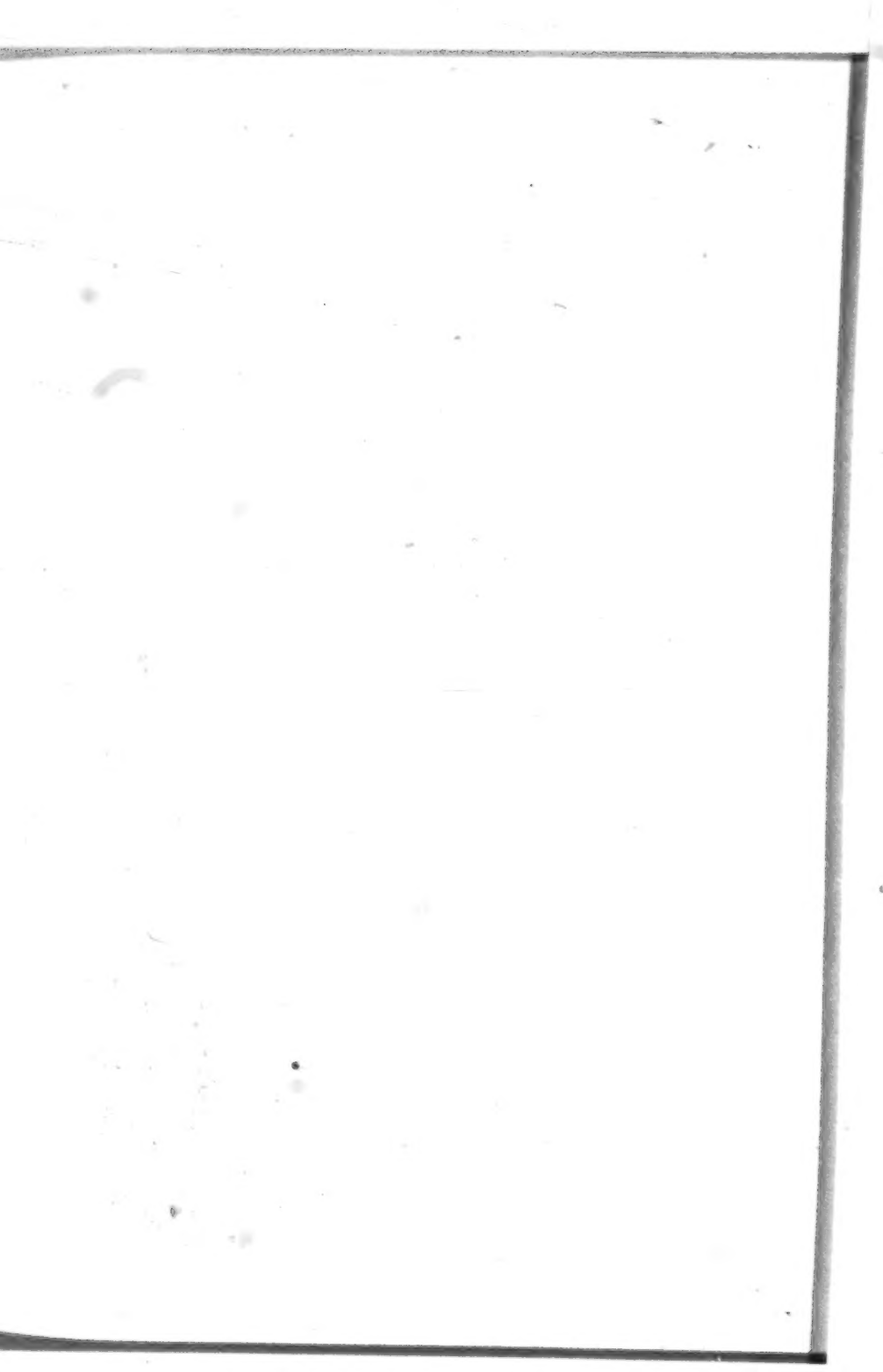
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In The
Supreme Court of the United States

October Term, 1972

No. 72-1129

SUSAN COHEN

Petitioner

v.

CHESTERFIELD COUNTY SCHOOL BOARD
and DR. ROBERT F. KELLY

Respondent

On Writ of Certiorari to the Court of Appeal
for the Fourth Circuit

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TABLE OF CONTENTS

	<i>Page</i>
CITATION TO OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
QUESTIONS PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. The Maternity Leave Regulation Under Which Pregnant Teachers May Be Required To Take A Leave Of Absence Is Not Based On Sex, And, Therefore, The "Strict Scrutiny" Test Is Not Applicable	7
II. The Maternity Leave Regulation Classifying Women On The Basis Of Their Physical Condition Is Not A "Suspect Classification," And, Therefore, The "Strict Scrutiny" Test Is Not Applicable	13
III. The Maternity Leave Regulation Does Not Prejudice Any Constitutional, Fundamental Or Civil Rights Of Pregnant Teachers, And, Therefore, The "Strict Scrutiny" Test Is Not Applicable	20
IV. The Maternity Leave Regulation Is Valid Under Either The "Rational Basis" Test Or The "Strict Scrutiny" Test ..	22
V. The Fourth Circuit's Exercise Of Discretion Under Rule 40 Of The Federal Rules Of Appellate Procedure Not To Grant Reargument Is Not A Denial Of Due Process Of Law	30
CONCLUSION	32

APPENDIX

TABLE OF AUTHORITIES

<i>Cases</i>	<i>Page</i>
<i>Archer and Johnson v. Mayes</i> , 213 Va. 633 (1973)	18
<i>Bolling v. Sharpe</i> , 347 U.S. 497 (1954)	14
<i>Bravo v. Board of Education</i> , 345 F. Supp. 155 (N.D. Ill. 1972)	11, 18
<i>Bucha v. Illinois High School Association</i> , 351 F. Supp. 69 (N.D. Ill. 1972)	18
<i>Brenden v. Independent School District 742</i> , 342 F. Supp. 1224 (D. Minn. 1972)	18
<i>Butchers' Union v. Crescent City</i> , 111 U.S. 746 (1884)	20
<i>Cohen v. Chesterfield County School Board</i> , 474 F.2d 395 (4th Cir. 1973)	9, 12, 18
<i>Dandridge v. Williams</i> , 397 U.S. 471 (1970)	22
<i>Eisenstadt v. Baird</i> , 405 U.S. 438 (1972)	22
<i>Eslinger v. Thomas</i> , 476 F.2d 225 (4th Cir. 1973)	18
<i>Feinerman v. Jones</i> , 356 F. Supp. 252 (M.D. Pa. 1973)	18
<i>Flores v. Secretary of Defense</i> , 355 F. Supp. 93 (N.D. Fla. 1973)	18
<i>Frontiero v. Richardson</i> , 36 L.Ed.2d 583 (1973)	6, 8, 9, 17, 19, 27
<i>Goesaert v. Cleary</i> , 335 U.S. 464 (1948)	17
<i>Green v. Waterford Board of Education</i> , 473 F.2d 629 (2d Cir. 1973)	18, 24
<i>Gruenwald v. Gardner</i> , 390 F.2d 591 (2d Cir.), cert. denied, 393 U.S. 865 (1968)	17
<i>Heath v. Westerville Board of Education</i> , 345 F. Supp. 501 (S.D. Ohio 1972)	18
<i>Hodgson v. Robert Hall Clothes, Inc.</i> , 473 F.2d 589 (3rd Cir. 1973)	16
<i>Hoyt v. Florida</i> , 368 U.S. 57 (1961)	18

	<i>Page</i>
Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), cert. denied, 385 U.S. 1003 (1967)	21, 23
Kisley v. City of Falls Church, 212 Va. 693 (1972)	16
LaFleur v. Cleveland Board of Education, 465 F.2d 1184 (6th Cir. 1972)	24
McGowan v. Maryland, 366 U.S. 420 (1961)	23
McLaughlin v. Florida, 379 U.S. 184 (1964)	14
Morey v. Doud, 354 U.S. 457 (1957)	23
Orr v. Trinter, 444 F.2d 128 (6th Cir. 1971), cert. denied, 408 U.S. 943 (1972)	21
Patrone v. Howland Local Schools Board of Education, 472 F.2d 159 (6th Cir. 1972)	21
Perry v. Sinderman, 408 U.S. 593 (1972)	22
Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), rev'g and remanding 416 F.2d 1257 (5th Cir. 1969)	9, 10
Pickering v. Board of Education, 391 U.S. 563 (1968)	21
Radice v. New York, 264 U.S. 292 (1924)	17
Rafford v. Randle Eastern Ambulance Service, Inc., 348 F. Supp. 316 (S.D. Fla. 1972)	11
Reed v. Reed, 404 U.S. 71 (1971)	6, 9, 12, 16, 17, 18, 27
Robinson v. Board of Regents of Eastern Kentucky University, 475 F.2d 707 (6th Cir. 1973)	18
Romans v. Crenshaw, 354 F. Supp. 868 (S.D. Tex. 1972)	18
Royster Guano Co. v. Commonwealth, 253 U.S. 412 (1920)	13, 23
San Antonio School District v. Rodriquez, 36 L.Ed.2d 16 (1973)	7, 14, 22, 30
Schattmen v. Texas Employment Commission, 459 F.2d 32 (5th Cir. 1972), cert. denied, 41 U.S. L.W. 3372 (Jan. 8, 1973) 10, 18, 24	

	<i>Page</i>
Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir.), cert. denied, 404 U.S. 991 (1971)	10
Truax v. Raich, 239 U.S. 33 (1915)	20, 21
Weber v. Aetna Casualty and Surety Company, 406 U.S. 164 (1972)	6, 28
West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)	17
Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970), aff'd without opinion, 401 U.S. 951 (1971)	17
Williams v. San Francisco Unified School District, 340 F. Supp. 438 (N.D. Cal. 1972)	18

Constitution

U.S. Const. amend. XIV, § 1	2
--	---

Statutes

28 U.S.C. § 1254(1)	2
29 U.S.C. § 206(d)	15
42 U.S.C. § 1983	3
42 U.S.C. § 2000e	15

Rules

Fed. R. App. P. 35	31
Fed. R. App. P. 40(a)	31

Miscellaneous

Bayh, The Need for the Equal Rights Amendment, 48 Notre Dame Lawyer 80 (1972)	18
Sedler, The Legal Dimensions of Women's Liberation: An Overview, 47 Ind. L. Rev. 419 (1972)	18
Comment, 25 Vand. L. Rev. 412 (1972)	18
Note, 1972 Wis. L. Rev. 626 (1972)	18

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On Writ of Certiorari to the Court of Appeals
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BRIEF FOR RESPONDENTS

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit sitting *en banc* is reported in 474 F.2d 395 (4th Cir. 1973). The opinion of the United States Court of Appeals for the Fourth Circuit initially affirming the judgment of the United States District Court for the Eastern District of Virginia, Richmond Division, is unreported. The decision of the United States District Court for the Eastern District of Virginia, Richmond Division, is reported at 326 F. Supp. 1159 (E.D. Va. 1971).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on September 14, 1972. On September 20, 1972, respondents filed their Petition for Rehearing and Suggestion for rehearing *en banc*, which Petition and Suggestion was granted on January 2, 1973. The judgment of the United States Court of Appeals for the Fourth Circuit, *en banc*, was entered on January 15, 1973. The petition for a writ of certiorari was filed on February 15, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV, Sec. 1

"... [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED FOR REVIEW

I. Is the "strict scrutiny" test applicable to a school board regulation pursuant to which pregnant teachers may be required to take a leave of absence after the fifth month of pregnancy?

II. Are there sufficient reasons, consistent with the Equal Protection Clause of the Fourteenth Amendment, to support a school board regulation pursuant to which pregnant teach-

ers may be required to take a leave of absence after the fifth month of pregnancy?

III. Is there a denial of due process of law where pursuant to Rule 40 of the Federal Rules of Appellate Procedure a United States Court of Appeals grants a rehearing and makes a final disposition of a cause without reargument?

STATEMENT OF THE CASE

This is a case brought under the Civil Rights of 1871, 42 U.S.C. § 1983. The petitioner, formerly employed as a public school teacher by the School Board of Chesterfield County, Virginia, complains that a school board regulation requiring her to be available for a leave of absence at the end of her fifth month of pregnancy discriminates against her as a woman and thereby deprives her of equal protection of the laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

Petitioner was employed as a school teacher by the respondent School Board for the 1970-71 school year under an employment contract as required by law. (A-13) That contract provides, in part, that "[t]he said part of the second part [the petitioner] shall comply with all school laws, State Board of Education regulations, and all rules and regulations made by the party of the first part [the respondent School Board] in accordance with the law and State Board of Education regulations. . . ." (A-2)

The petitioner challenges the constitutionality of the respondent School Board's maternity leave regulation, which provides, in pertinent part, as follows:

- a. Notice in writing must be given to the School Board at least six (6) months prior to the date of expected birth.

b. Termination of employment of an expectant mother shall become effective at least four (4) months prior to the expected birth of the child. Termination of employment may be extended if the superintendent receives written recommendations from the expectant mother's physician and her principal, and if the superintendent feels that an extension will be in the best interest of the pupils and school involved. (A-20, 21)

The rule further provides that upon termination of employment a pregnant teacher goes on maternity leave and continues to enjoy personal benefits during such leave and has a guarantee of reemployment. (A-20, 21)

On or about November 2, 1970, the petitioner notified the respondent School Board in writing that she was pregnant. She stated that her estimated date of delivery was April 28, 1971, and, with the consent of her obstetrician, requested that she be given maternity leave effective April 1, 1971. (A-13)

Her request was denied and effective at the close of school on December 18, 1970, the day before Christmas vacation, maternity leave was granted pursuant to the School Board regulation. (A-13)

On November 25, 1970, the petitioner personally appeared before the School Board and requested an extension of her maternity leave date from December 18, 1970 to January 21, 1971. This was denied. (A-13, 14) The basis for denial was that the School Board had a replacement teacher available for hire. (A-112)

Various reasons were assigned for the existence of the maternity leave regulation. According to respondent Robert F. Kelly, the Division Superintendent of the Chesterfield County, Virginia school system, the main reason for the maternity leave regulation is to foster "continuity of teaching" by giving the School Board advance notice upon which it can

program its need for and secure replacement teachers in an orderly fashion. (A-109, 112, 113)

He also indicated that the maternity leave regulation is based upon a concern for absenteeism of pregnant school teachers, for the safety of the school children in emergency situations, such as fire, and for the safety of the unborn fetus and the expectant mother as a result of the exposure to pushing by students in the school halls and classrooms. (A-60, 61, 64) Similar expressions, although varying in emphasis, were made by the chairman and members of the School Board. (A-44, 48, 49, 56) Petitioner herself introduced expert medical evidence that pregnant teachers who experience no complications are likely to be absent thirteen or fourteen school days because of scheduled doctor appointments. (A-31, 32, 69, 80-81)

The expert medical evidence was that pregnancy is a "normal biological function" and not a sickness or injury. (A-32) The evidence further indicated that pregnancy alone does not incapacitate a school teacher after the fifth month of pregnancy, and that no incapacitating medical disorders are certain to occur after the fifth month of pregnancy. (A-25) It was conceded, however, that no two pregnancies are alike, and that certain incapacitating medical disorders peculiar to pregnancy could occur after the fifth month of pregnancy. (A-24, 73, 74) The United States Court of Appeals for the Fourth Circuit, sitting *en banc*, recognized the School Board's reasons for the regulation and upheld it "as contributing to the better education of the pupils by enabling school officials to arrange a larger degree of continuity in their instruction." 474 F.2d at 399.

SUMMARY OF ARGUMENT

Respondents submit that the classification contained in the Chesterfield County School Board maternity leave regu-

lation is based on pregnancy rather than sex and that the traditional "rational basis" test should be applied to measure the constitutionality of the regulation under the Fourteenth Amendment. Even if the classification is viewed as affecting only women, it should not be deemed suspect and viewed with strict judicial scrutiny since, unlike the statutes which this Court held unconstitutional in *Reed v. Reed*, 404 U.S. 71 (1971) and *Frontiero v. Richardson*, U.S., 36 L. Ed. 2d 583 (1973), the maternity leave rule does not have the effect of invidiously relegating the entire class of females to an inferior legal status or discriminating in favor of males. Moreover, the suspect classification adopted by four justices of this Court in *Frontiero* is inapplicable to the instant case because *Frontiero* recognizes physical disability as a non-suspect classification.

The challenged regulation represents a legitimate effort to provide a better education to pupils in the Chesterfield County School system by allowing school officials to plan for expected turnovers in personnel because of pregnancy and to insure that there is no interval during which a qualified teacher is not available to assume the duties of a teacher on maternity leave. That this is the purpose of the regulation is reflected in the provision which permits the School Board to retain a teacher beyond the fifth month of pregnancy if a qualified replacement is unavailable and the pregnant teacher is willing to remain. Thus, when the case at bar is examined in accordance with the equal protection analysis employed by the Court in *Weber v. Aetna Casualty and Surety Company*, 406 U.S. 164 (1972), it is manifest that continuity of education is a legitimate state interest and that the maternity leave rule does not interfere with petitioner's fundamental rights.

Respondents maintain that the challenged maternity leave regulation is not arbitrary and does not constitute invidious

discrimination. Furthermore, the rule should be upheld under either the "rational basis" or "strict scrutiny" tests.

ARGUMENT I.

The Maternity Leave Regulation Under Which Pregnant Teachers May Be Required To Take A Leave Of Absence Is Not Based On Sex, And, Therefore, The "Strict Scrutiny" Test Is Not Applicable.

As observed by Mr. Justice Powell in *San Antonio School District v. Rodriguez*, _____ U.S. _____, 36 L. Ed. 2d 16, 34 (1973), in equal protection cases many courts have virtually assumed that a particular classification is suspect "[r]ather than focusing on the unique features of the alleged discrimination. . . ." The case at bar presents a situation where the initial inquiry concerning the nature of the challenged classification is especially appropriate, since the issue raised by the petitioner relating to the application of a "strict scrutiny" test is entirely irrelevant unless the policy of the School Board involves a classification based on sex. Respondents submit that the Fourth Circuit correctly held that the classification involved is not based on sex, but is focused on a physical condition resulting in absenteeism at a fixed date—namely, pregnancy. Chief Judge Haynesworth properly rejected as simplistic Mrs. Cohen's argument that a maternity leave regulation is based on sex:

We conclude, first, that the regulation is not an invidious discrimination based upon sex. It does not apply to women in an area in which they may compete with men. . . .

We do not accept Mrs. Cohen's premise that the regulations provision which denies her, with the advice of her doctor, the right to decide when her maternity leave will begin is an invidious classification based upon sex which may be justified only by some compelling state

interest. Such invidious discriminations are found in situations in which the sexes are in actual or potential competition. A statutory preference for men over women in the appointment of administrators was recently stricken by the Supreme Court as quite unjustified by considerations of administrative convenience. [Footnote omitted]

Only women become pregnant; only women become mothers. But Mrs. Cohen's leap from those physical facts to the conclusion that any regulation of pregnancy and maternity is an invidious classification by sex is merely simplistic. The fact that only women experience pregnancy and motherhood removes all possibility of competition between the sexes in this area. . . . Pregnancy and motherhood do have a great impact on the lives of women, and, if that impact be reasonably noticed by a governmental regulation, it is not to be condemned as an invidious classification. 474 F.2d at 397.

An examination of the decisions reveals that it has been universally held that a classification based on sex is one which denies to one sex a right or privilege which is given to the other sex. Thus, a disparity in treatment between the sexes is necessary before a classification can be said to rest on sex. The authorities cited by petitioner in her brief offer prime examples of sex classifications. In each the challenged rule or law treated similarly situated men and women differently. For example, in *Frontiero* this Court held unconstitutional statutes which disallowed a servicewoman to claim her husband as a dependent for purposes of obtaining increased quarters allowance and medical and dental benefits unless she proved that he was in fact dependent upon her for over one-half of his support, yet a serviceman was permitted to claim his wife as a dependent without showing that she was dependent upon him for any part of her support. Mr. Justice Brennan, speaking for four justices, be-

believed that the statutes violated the Fifth Amendment, because they "command 'disimilar treatment for men and women who are . . . similarly situated.'" 36 L. Ed. 2d at 593. (Citing *Reed*, *supra*, 404 U.S. at 77) (Emphasis supplied).

Both Justice Brennan in *Frontiero* and Chief Judge Haynesworth in *Cohen* cited *Reed* for the proposition that the equal protection clause proscribes unreasonable discrimination between persons similarly situated. *Reed* involved an arbitrary preference of males over females when both were equally qualified and both wished to qualify for administration of an estate. In holding such a statutory scheme unconstitutional, this Court stated that "[t]o give a mandatory preference to members of either sex over members of the other . . . is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment. . . ." 404 U. S. at 76 (emphasis supplied).

Clearly, for a classification to be based on sex there must be discrimination against one sex and discrimination in favor of the other. Recent Title VII cases demonstrate that by definition a sex classification is one which causes different treatment of men and women who are in all other respects similarly situated. Typical in this regard is *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), a case which involved a rule of employment applicable to women with pre-school children but not applicable to men with pre-school children. As this Court noted, "The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men—each having pre-school-age children." *Id.* at 544.

The petitioner relies on the language of Judge Brown in his dissent below in *Phillips*, 416 F.2d 1257, 1259 (5th Cir. 1969), where he discusses the distinguishing factor—mother-

hood versus fatherhood. Petitioner would apply this same argument to the facts of our case. Yet, she ignores the fact that in *Phillips* the distinguishing factor *was* sex—fatherhood versus motherhood. In the present case the distinguishing factor is not sex. It is *pregnant* women versus all other women and all men. Women may fall into either category of pregnant or nonpregnant, and the category into which they fall depends only on the condition of pregnancy. Petitioner attacks the maternity provision not because she is a woman treated differently from men, but because she is pregnant and thereby subject to the maternity provision. Her complaint is that pregnant women are treated differently from non-pregnant women and all men. Her complaint does not show a disparate treatment between men and women.

Petitioner has in her brief relied on other Title VII cases which, unlike the case at bar, involve prime examples of sex classifications. For instance, in *Sprogis v. United Air Lines, Inc.* 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), the challenged employment policy prohibited stewardesses from being married, but allowed male stewards to be married. The policies thus discriminated against women and in favor of men—a plain denial of equal protection. By comparison, pregnancy is *sui generis* in that it is a physiological condition which only affects women and not men. Indeed, petitioner cites the dissent in *Schattmen v. Texas Employment Commission*, 459 F.2d 32, 42 (5th Cir. 1972), *cert. denied*, 41 U.S. L.W. 3372 (Jan. 8, 1973) for the same proposition. However, this very fact—that only a woman may become pregnant—compels a finding that a classification based on pregnancy is not a classification based on sex because it in no way affects males. This conclusion was reached by the majority in *Schattman*, which rejected the argument that the maternity leave regulation of the Texas Employment Commission discriminated on the basis of sex:

"It did not terminate her employment because she was a woman or because she became pregnant but only because her pregnancy was far advanced." *Id.* at 39. And, in *Bravo v. Board of Education*, 345 F. Supp. 155, 157 (N.D. Ill. 1972), a similar interpretation was made with respect to a maternity leave rule for teachers:

The court disagrees with the plaintiff's assertion that § 4-37's classifications constitute sex discrimination and need not, therefore, pass on the difficult question of whether sex is an inherently suspect criterion.

A classification based on pregnancy is one which discriminates between categories of women rather than between the sexes. In like manner, a rule affecting only men, as for example a regulation prohibiting the wearing of beards or moustaches, does not result in sex discrimination. As stated by the court in *Rafford v. Randle Eastern Ambulance Service, Inc.*, 348 F. Supp. 316, 319-20 (S.D. Fla. 1972):

It has been held that a company's policy of terminating the employment of pregnant females violated [Title VII] because it involved termination based on "a condition attendant to their sex." [citation omitted] I respectfully disagree with such an expansive reading of Title VII. The discharge of pregnant women or bearded men does not violate the Civil Right Act of 1964 simply because *only women become pregnant and only men grow beards. In neither instance are similarly situated persons of the opposite sex favored.* These cases are perhaps more properly considered under the rubric of *Cooper v. Delta Air Lines, Inc.*, 274 F. Supp. 781 (E.D. La. 1967), that discrimination between different categories of the same sex is not unlawful discrimination by sex. This is a case of discrimination in favor of men who shave off their beards and moustaches. It does not involved proscribed sex discrimination. (emphasis supplied)

By contrast, a rule which limits the length of men's hair but not women's hair is plainly sex discrimination because both sexes are able to grow long hair.

The argument that a maternity policy is a discrimination against women because of a condition attendant to their sex ignores the fact that pregnancy is *sui generis* and that men are not affected by any experience similar to pregnancy. Thus, with regard to pregnancy men and women are different. And this Court has consistently held "that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways." *Reed, supra*, 404 U.S. at 75. In application of this principle to the facts of this case Chief Judge Haynesworth wrote: "How can the state deal with pregnancy and maternity in terms of equality with paternity? It cannot, of course" *Cohen, supra*, 474 F.2d at 398.

It is equally manifest that the contention that a maternity leave rule may be compared to a sick leave policy which allows men to take scheduled or unscheduled leave on account of sickness or injury must fail simply because pregnancy is not a sickness or injury. This is made clear in petitioner's deposition of Doctor Leo J. Dunn, Professor and Chairman of Obstetrics and Gynecology for the Medical College of Virginia:

Q Is pregnancy a sickness or injury?

A No.

Q Could you give a medical definition of what pregnancy is in physical relationship?

A *It is a normal biological function. It should not be regarded as an illness anymore than menstrual periods should be regarded as an illness or any bodily function should be considered as an illness. An illness is when [a] bodily function is deranged, there is [a]*

malfunction of symptoms and pregnancy is, of course, a normal biologic phenomena. (A-32) (emphasis supplied).

Thus, the comparison of a woman's "normal biological function" with a man's sickness or injury is a classic example of comparing apples with oranges.

It is clear from the record in this case that the maternity leave regulation is not an invidious scheme to restrict women from teaching in the Chesterfield School System. In fact, approximately 85% of the teachers in the system are women, the petitioner's replacement was a woman, and in large part women teachers recommended that the School Board adopt the present maternity leave policy. (A-39) The petitioner cannot seriously argue that the maternity leave regulation discriminates in favor of men and against women. This is not a policy aimed at preferring men to women. It is a policy calculated to minimize the disruption which attends pregnancy, and the only question is whether the classification is reasonable and rests "upon some ground of difference having a fair and substantial relation to the object of the legislation. . . ." *Reed, supra*, 404 U.S. at 76, quoting *Royster Guano Co. v. Commonwealth*, 253 U.S. 412, 415 (1920).

ARGUMENT II.

The Maternity Leave Regulation Classifying Women On The Basis Of Their Physical Condition Is Not A "Suspect Classification," And, Therefore, The "Strict Scrutiny" Test Is Not Applicable.

Petitioner has argued that, assuming a classification based on sex, a suspect classification arises and the "strict scrutiny" test, sometimes applied in equal protection cases involving discrimination based on race, alienage or national origin, should be applied. To support this proposition petitioner cites as authority Mr. Justice Brennan's opinion in *Frontiero*.

Respondents submit that the classification is not based on sex, but even assuming that it does make a distinction between the sexes, there are other policy considerations in this case which militate against a determination that the classification is suspect. Respondents further assert that *Frontiero*, when viewed in the light of previous decisions by this Court setting forth the reasons for applying a strict judicial scrutiny test to particular classifications, supports the contention that a rule which places pregnant women in one category and other women and all men in another does not create an inherently suspect classification.

While it has been held that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination, *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964), and that racial classifications are constitutionally suspect and therefore subject to the most rigid judicial scrutiny, *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Court has extended the suspect label to classifications similar to race, such as alienage and national origin. As recently noted by Mr. Justice Marshall in his dissenting opinion in *Rodriguez*, 36 L. Ed. 2d at 85-87 (1973), the reasons for applying the suspect classification analysis are basically threefold. First, "[c]ertain racial and ethnic groups have frequently been recognized as 'discrete and insular minorities' who are relatively powerless to protect their interests in the political process." Second, certain classifications are "in most circumstances irrelevant to any constitutionally acceptable legislative purpose." And, third, generally the basis for a suspect classification—as, for example, the color of one's skin or the legitimacy of one's birth—is something the individual cannot control.

It is submitted that a classification based on pregnancy is in important respects different from those classifications which the Court has previously held suspect and the classifi-

cation should therefore be sustained if not totally irrelevant to any legitimate state interest. Although it is conceded that pregnant women are a minority, there is no evidence that as a group they lack the power and the resources to effect change through the political process. In fact the record in this case reflects that the policy was adopted with the recommendation of the teachers. Moreover, because pregnancy, unlike race, is a valid basis for measuring the physical capabilities of individuals, the pregnancy classification cannot be deemed to be *per se* irrelevant to any acceptable legislative purpose. Lastly, and perhaps most importantly, pregnancy is something the individual can control. Modern birth control devices are generally recognized as effective in allowing a woman to prevent pregnancy or to plan her pregnancy for the time most convenient to her, her family, and society.

Even assuming that a rule which treats pregnant women differently than nonpregnant women and men makes a sex classification, a point which respondents do not concede, the facts of the case at bar demonstrate that sex should not be viewed as a suspect classification. When examined in light of the reasons given by this Court for applying the suspect classification analysis, it is significant to note that women are not a minority but are in fact a majority of the population and now have it within their means to obtain ameliorative legislation through the political process. Indeed, the Equal Pay Act of 1963, 29 U.S.C. § 206(d), Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et. seq.*, the proposed Equal Rights Amendment, and regulations promulgated by administrative agencies such as the EEOC are prime examples of the ability of women to effect change where change is needed.

While it is plain that women are unable to change their sex, it cannot be forgotten that women can determine when and if they will become pregnant. In addition, the fact that

only women can experience pregnancy indicates at the very least that pregnancy is an important and judicially recognizable difference between the sexes. Sex, then, unlike race or alienage, cannot be said to be *per se* irrelevant to any constitutionally acceptable legislative purpose. That sex should not be deemed a suspect classification has been the position taken by this Court, and reason and sound judicial policy indicate that on the facts of the case at bar this position should not be changed.¹

Respondents do not take the untenable position that the Court should hold that the Fourteenth Amendment permits arbitrary sex discrimination. Respondents do maintain that because of the fact that there *are* differences between the sexes—namely, pregnancy—and since women have the power to protect themselves through the political process, sex classifications are in many instances more appropriately judicially examined under the traditional “rational basis” test. The overwhelming weight of authority supports respondents’ position that sex classifications should not be viewed with strict judicial scrutiny. *Reed v. Reed*, 404 U.S. 71 (1971);

¹ Sex, unlike race, national origin, and alienage, has often been justified as a distinguishing factor in employment practices. See, e.g., *Kisley v. City of Falls Church*, 212 Va. 693 (1972), holding that a municipal ordinance which restricted employment opportunities in massage parlors by requiring that services be rendered to customers be performed by an employee of the same sex as the customer does not deprive such employees of their constitutional right to equal protection of the law. The ordinance *applied alike to both males and females*, and was a reasonable regulation designed to maintain the moral welfare of the community under the police power of the municipality. See also, *Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d 589 (3rd Cir. 1973), a case decided under the Equal Pay Act of 1963, where the Court of Appeals for the Third Circuit noted that assignment of males to the men’s department and females to the women’s department was justified by the *business necessity* of avoiding embarrassment to customers trying on clothes. What the courts here are recognizing is that (1) certain differences between men and women do exist, and (2) sometimes these differences can legitimately affect employment practices.

Hoyt v. Florida, 368 U.S. 57 (1961); *Goesaert v. Cleary*, 335 U.S. 464 (1948); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Radice v. New York*, 264 U.S. 292 (1924); *Gruenwald v. Gardner*, 390 F.2d 591 (2d Cir.) *cert. denied*, 393 U.S. 865 (1968); *Williams v. McNair*, 316 F. Supp. 134 (D.S.C. 1970), *aff'd without opinion*, 401 U.S. 951 (1971).

In *Reed* the Court struck down a statute under the Equal Protection Clause which preferred male candidates to female candidates for qualification on estates. In doing so, the Court applied the traditional "reasonable" test:

In applying that clause, this Court has constantly recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. *Barbier v. Connolly*, 113 U.S. 27 (1885); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949); *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969). The Equal Protection Clause of that Amendment does, however, deny to states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. *A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."* *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). 404 U.S. at 75-76 (emphasis supplied).

According to Mr. Justice Brennan and three other justices in *Frontiero, supra*, *Reed* implicitly held that sex is a suspect classification. Such a position is not only not supported by the decisions of this Court (see Mr. Justice Powell's concurring opinion in *Frontiero*, 36 L. Ed. 2d at 595), it is also in conflict with the many lower court cases and law review

articles which have interpreted *Reed* as holding that a classification based on sex is not inherently suspect. *Eslinger v. Thomas*, 476 F.2d 225 (4th Cir. 1973); *Robinson v. Board of Regents of Eastern Kentucky University*, 475 F.2d 707 (6th Cir. 1973); *Green v. Waterford Board of Education*, 473 F.2d 629 (2nd Cir. 1973); *Cohen v. Chesterfield County School Board*, 474 F.2d 395 (4th Cir. 1973); *Schattman v. Texas Employment Commission*, 459 F.2d 32 (5th Cir. 1972) cert. denied 41 U.S.L.W. (Jan. 8, 1973); *Feinerman v. Jones*, 356 F. Supp. 252 (M.D. Pa. 1973); *Flores v. Secretary of Defense*, 355 F. Supp. 93 (N.D. Fla. 1973); *Bucha v. Illinois High School Association*, 351 F. Supp. 69 (N.D. Ill. 1972); *Heath v. Westerville Board of Education*, 345 F. Supp. 501 (S.D. Ohio 1972); *Bravo v. Board of Education*, 345 F. Supp. 155 (N.D. Ill. 1972); *Brenden v. Independent School District 742*, 342 F. Supp. 1224 (D. Minn. 1972). Cf. *Romans v. Crenshaw*, 354 F. Supp. 868 (S.D. Tex. 1972); *Williams v. San Francisco Unified School District*, 340 F. Supp. 438 (N.D. Cal. 1972). See also *Archer and Johnson v. Mayes*, 213 Va. 633 (1973). In a recent commentary on the proposed Equal Rights Amendment, Senator Birch Bayh stated:

[T]he Court [in *Reed*] did not overrule such cases as *Goesaert* and *Hoyt*, and it did not hold that sex discrimination is "suspect" under the fourteenth amendment. Instead the Court left the burden on every woman plaintiff to prove that governmental action perpetuating sex discrimination is unreasonable.

Bayh, *The Need for the Equal Rights Amendment*, 48 Notre Dame Lawyer 80, 85 (1972). See also Sedler, *The Legal Dimensions of Womens Liberation: An Overview*, 47 Ind. L. Rev. 419 (1972); 25 Vand. L. Rev. 412 (1972); 1972 Wis. L. Rev. 626 (1972).

Of course, this Court makes the final interpretation of the Constitution and declares the scope of its protection. It is respectfully submitted, however, that in light of previous

decisions of the Court consistently holding that sex discrimination is not inherently suspect and because this position has been steadfastly maintained in the lower courts, neither *Reed* nor *Frontiero* should now be read as making sex a suspect classification.

A close reading of Mr. Justice Brennan's opinion in *Frontiero* reveals that his reasoning in that case supports respondents' argument that the classification in the case at bar should not be regarded as suspect. The statute in *Frontiero*, unlike the maternity rule in this case, plainly discriminated on the basis of sex. The following statement by Justice Brennan underscores the important differences between the two cases:

[W]hat differentiates sex from such nonsuspect statutes as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. [Footnote omitted] As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to [an] inferior legal status without regard to the actual capabilities of its individual members. 36 L. Ed. 2d at 592.

Initially, it must be noted that the classification in this case—that is, pregnant women versus nonpregnant women and all men—is analogous to classifications based on physical disability in that pregnancy manifestly bears a relation to ability to perform and contribute to society. That this is so becomes even more apparent when the maternity regulation is compared to a traditionally suspect classification such as race, which has absolutely nothing to do with ability to perform. While there is disagreement concerning the type of functions pregnant women are unable to perform and the extent of their disability, experts concede that pregnancy does result in a diminution in a woman's ability to perform certain tasks

and at a given point in time she will be completely incapable of performing certain tasks. Thus, it cannot be said that pregnancy is irrelevant to any constitutionally acceptable legislative purpose and should be deemed suspect.

It is also perfectly manifest that the maternity regulation does not have the effect of "relegating the entire class of females to [an] inferior legal status without regard to the actual capabilities of individual members." The rule applies only to pregnant women and does not discriminate against females in general or in favor of men. Even if the classification is deemed to be based on sex, it only affects women who decide to become pregnant.

ARGUMENT III.

The Maternity Leave Regulation Does Not Prejudice Any Constitutional, Fundamental Or Civil Rights Of Pregnant Teachers, And, Therefore, The "Strict Scrutiny" Test Is Not Applicable.

Petitioner argues that the maternity leave regulation must be viewed with strict scrutiny because it contravenes her fundamental right to public employment, her right to privacy, and her right to marry and procreate. This argument is not supported by reason, authority, or the facts of this case.

At the outset, it is important to point out that petitioner has incorrectly cited *Butchers' Union v. Crescent City*, 111 U.S. 746 (1884) and *Truax v. Raich*, 239 U.S. 33 (1915) as holding that the right to employment is explicitly or implicitly guaranteed by the Constitution. The basis for the Court's holding in *Butcher's Union*, which is expressed in an opinion written by Mr. Justice Miller, is that a state legislature cannot by contract limit the exercise of the police powers of the state to the prejudice of the general welfare, the public health, and the public morals. The language quoted by petitioner in her brief is taken from Mr. Justice Bradley's concurring opinion.

Truax did not affirm *Butcher's Union*, but held on its facts that a classification based on alienage was a denial of equal protection.

Indeed, petitioner's argument that there is a fundamental right to public employment has been explicitly rejected in several recent decisions. In *Patrone v. Howland Local Schools Board of Education*, 472 F.2d 159 (6th Cir. 1972), it was held that a teacher has no constitutional rights arising above those of her contract and the laws of the state. Moreover, in *Johnson v. Branch*, 364 F.2d 177, 179 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967) the court stated: "There is no vested right to public employment. No one questions the fact that the plaintiff has neither a contract nor a constitutional right to have her contract renewed. . . ." To the same effect is *Orr v. Trinter*, 444 F.2d 128, 133 (6th Cir. 1971), *cert. denied*, 408 U.S. 943 (1972), which held that a teacher's constitutional rights had not been violated by an unexplained refusal to renew his contract.

Recently the Court in *Rodriguez* held that there is no fundamental right to public education:

Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. 36 L. Ed. 2d at 44.

Certainly, if a student in a public school has no fundamental constitutional right to an education, it is clear that a teacher instructing that student has no fundamental constitutional right to teach, unless it is proved, as it has not been done here, that removal will result in a denial of other fundamental rights such as freedom of speech. See, e.g., *Pickering v. Board of Education*, 391 U.S. 563 (1968).

Petitioner's argument that the maternity leave policy interferes with her rights to privacy, marriage and procreation

has no basis in reason. The rule does not infringe upon a woman's right to get married, it does not invade the privacy in the home, it does not attempt to dictate when and if a woman should become pregnant and have children, and it does not intrude into an individual's private life during pregnancy.

The only "right" involved in this case is the asserted right of a teacher to be employed during the advanced stage of her pregnancy. Surely this is not a right explicitly or implicitly guaranteed by the Constitution, *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Dandridge v. Williams*, 397 U.S. 471 (1970), nor is there a sufficient nexus between a constitutional guarantee and a non-constitutional interest so as to warrant the application of the strict judicial scrutiny test. *Rodriguez, supra*, 36 L.Ed. 2d at 83-84 (Marshall, J., dissenting). Instead, this is a case involving the relationship of a teacher in a public school system with her employer. As Mr. Chief Justice Berger stated in his concurring opinion in *Perry v. Sinderman*, 408 U.S. 593, 603 (1972):

[T]he relationship between a state institution and one of its teachers is essentially a matter of state concern and local law.

ARGUMENT IV.

The Maternity Leave Regulation Is Valid Under Either The "Rational Basis" Test Or The "Strict Scrutiny" Test.

In the final analysis the petitioner's brief has focused on the issue of burden of proof in equal protection cases involving classifications based on sex. Her purpose is to require the respondents to carry the burden of proving a compelling state interest for the existence of the maternity leave regulation. The respondents were not faced with this burden below. Even so, their evidence sets forth a reasonable basis for the regulations. Under the "reasonableness" test the reason for

the regulation may consist of matters conceived of by the court itself, and need not be literally stated in the respondent's evidence.² Respondents also submit that even if tested by the "strict scrutiny" test, the challenged regulation in the case at bar does not violate the equal protection clause.

The record shows that the main reason for the maternity leave regulation is to foster "continuity of teaching" by giving the respondent School Board advance notice upon which it can program its need for and secure replacement teachers in an orderly fashion.

Contrary to petitioner's assertions, and unlike the regu-

² The petitioner argues that even under the reasonableness test, the court can rely only on the facts and logic set forth by the defendants. The plaintiff cites *Johnson v. Branch*, 364 F.2d 177, 181 (4th Cir. 1960), *cert. denied*, 385 U.S. 1003 (1967), for the proposition that in testing the exercise of discretion by the board the court may consider only the logic relied on by the School Board itself. In *Johnson* the School Board was vested by statute with the discretion to re-employ a teacher in the next school year. The court there merely said that in reviewing this exercise of discretion, it must rely on the facts and logic used by the Board. Our case is dissimilar. Here the respondents have not exercised discretion. They have simply applied a regulation, the constitutionality of which may be tested by a review of the regulation itself. Under such standards of review, the court is not limited to a critique of the logic which some members of the Board may attribute to the regulation. Under the traditional test the respondents and the court may justify the regulation at any time by the application of sound reason. As long as a valid objective is established and the regulation in question reasonably advances this objective, the regulation does not violate the Equal Protection Clause. "When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed." (Emphasis supplied). *Morey v. Doud*, 354 U.S. 457, 464 (1957). In *Royster Guano Co. v. Commonwealth*, 253 U.S. 412, 416 (1920), cited recently by the Supreme Court in *Reed v. Reed*, *supra*, the Court said, in dealing with the attack on a tax statute as violative of equal protection, "But no ground is suggested, nor can we conceive of any, sustaining this exemption. . . ." (Emphasis supplied) And in *McGowan v. Maryland*, 366 U.S. 420, 426 (1961) the Court stated: "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

lations involved in many other cases, as for example *Green v. Waterford Board of Education*, 473 F.2d 629 (2d Cir. 1973), *LaFleur v. Cleveland Board of Education*, 465 F.2d 1184 (6th Cir. 1972), and *Schattman v. Texas Employment Commission*, 459 F.2d 32 (5th Cir. 1972), *cert. denied*, 41 U.S.L.W. 3372 (Jan. 8, 1973), the maternity leave rule in this case is not mandatory. Instead, the regulation provides in pertinent part:

Termination of employment may be extended if the superintendent receives written recommendations from the expectant mother's physician and her principal and if the superintendent feels that an extension will be in the best interest of the pupils and school involved.

This provision which permits the superintendent in his discretion to extend the period during which a pregnant teacher may teach is important because it provides the flexibility which is needed to account for unusual hardships affecting the pregnant teacher, and because in some situations a replacement teacher may be unavailable and it will be necessary to retain the pregnant teacher until a qualified replacement can be found. In this case there is no evidence that Mrs. Cohen would experience any undue hardship by virtue of commencing her leave four months before her expected delivery date, but there was evidence that the School Board had a replacement teacher available for employment on Mrs. Cohen's scheduled maternity leave date.

The plaintiff has played the numbers game in an effort to show the regulation is arbitrary by questioning why the leave is not required after the third month, or the fourth, or the sixth, and so on, of pregnancy (A. 123). Admittedly, there is nothing magic in tying the maternity leave to the fifth month of pregnancy. However, by doing so, the Board has fixed a date on which it can plan for replacements and has allowed a period of at least four months in which it may ex-

tend this date. To argue that the same or similar objectives could be accomplished by requiring leave after the third, fourth or sixth month begs the question. This does not show that the regulation is arbitrary; it merely shows that there are other ways to accomplish the same objective.

Pregnancy, unlike other medical conditions, has a unique predictability. On or about nine months from conception a pregnant school teacher will be unavailable to perform her duties.

With this in mind the School Board must follow some uniform procedure to provide for the replacement of pregnant teachers in a manner calculated to cause the least disruption in the classroom and in the continuity of education. Anything less than a uniform procedure would be unfair to the teachers themselves.

That continuity in the educational program is the chief reason for requiring maternity leave to commence four months before the anticipated date of birth is clear from the testimony of the Division Superintendent of the Chesterfield County School System, Dr. Robert F. Kelly:

This is the main thesis behind the maternity leave. If we wish and hope to continue the continuity of teaching, there is a point about which we would like to know that a teacher is going to leave so that we can start looking for a qualified replacement for that teacher. (A. 109)

In this case the regulation achieved that very purpose. Thus, Dr. Kelly further testified as follows:

She was told that she would leave at the end of the fifth month which at this particular time happened to run around December 18. Another request came in from both Mrs. Cohen and the principal requesting that she be able to remain until the end of the first semester which would have been around January 21. In consultation with the personnel department it was deter-

mined that by happenstance we had an applicant with a master's degree and experience equal to Mrs. Cohen, that we could hire the person right after the Christmas vacation, and it was felt at that point that that would be better for the students and the continuity of the program. And her request was denied. (A. 112)

Other reasons were given as further bases for the regulation. Dr. Kelly and the members of the School Board indicated that the maternity leave regulation represents a concern for excessive absenteeism by teachers during the last four months of pregnancy, injury to the pregnant teacher or her fetus, or both, as a result of exposure to pushing and shoving by students in the halls and classrooms, education of students who could be distracted by the physical appearance of a pregnant teacher, and the safety of the pregnant teacher and her students in emergency situations, such as fire. Petitioner's expert witnesses testified that pregnant teachers who experience no complications are likely to be absent thirteen or fourteen school days because of scheduled doctor appointments. (A-31, 32, 69, 80-81) These reasons, which vary in emphasis, illustrate the range of justification for the regulation.

These reasons illustrate, too, that the regulation is addressed to conditions of potential import. Must the School Board, for example, await a fire in a school and injury to a teacher in her eighth month of pregnancy who cannot negotiate a crowded hall of excited students before a regulation requiring maternity leave at the end of the fifth month has a rational justification? The answer is, and should be, an emphatic no.

Perhaps most teachers could respond satisfactorily to such an emergency in their eighth, or even their ninth, month of pregnancy, although medical experts concede that coordination, agility and dexterity are diminished in the last months

of pregnancy (A. 34, 80). The expert medical evidence shows that no two pregnancies are alike. Different women are affected in different ways. For this reason it is entirely reasonable for the School Board to have a maternity leave regulation addressed in part to potential conditions that could arise, if only in some small number of cases.

Perhaps most teachers would not suffer any complications during the last four months of their pregnancy. But here, too, we are reminded that no two pregnancies are identical, and that there are some medical complications peculiar to pregnancy which usually occur only during the last months of pregnancy (A. 24). In view of this potential for complications, and the attendant unavailability of the teacher with little or no advance notice, the School Board may properly undertake to minimize the risks with a regulation which requires maternity leave after the fifth month of pregnancy.

Petitioner incorrectly maintains that the purpose of the maternity rule is to serve the end of administrative convenience. She misconstrues the means adopted by the School Board and the ends which the regulation are designed to achieve. The statutes in *Reed* and *Frontiero* are unlike the rule in this case in that their sole asserted purpose was to save money by promoting speed and efficiency in administration. Here the primary purpose of the maternity leave policy is not to promote speed and efficiency or a similar administrative goal, but to provide a better education to pupils in the Chesterfield County School system.

The petitioner also criticizes the rule by asking why a rule does not exist for broken legs or a condition such as prostatitis. The answer to both is obvious: The timing of a broken leg never has predictability and it is impossible to plan for its inconvenience. For prostatitis, it is submitted that such a condition does not present a significant problem in a school system in which 80% of the teachers are women.

Pregnancy on the other hand obviously creates problems which both the School Board and the teachers considered important enough to regulate. Certainly the School Board need not through regulations provide for every foreseeable problem, much less those as remote and inconsequential as broken legs and protatitis.

In *Weber v. Aetna Casualty and Surety Company*, 406 U.S. 164, 173 (1972) the Court stated that the essential inquiry in all equal protection cases is a dual one:

What legitimate state interests does the classification promote? What fundamental personal rights might the classification endanger?

Thus, this case involves the resolution of the interest of a teacher in working during the final months of her pregnancy and the interest of a School Board in providing a better education. Petitioner has no fundamental right to public employment, but the School Board has the difficult responsibility of finding qualified replacements for teachers who must take a leave of absence because of pregnancy.

Petitioner expects too much when she asks that the School Board determine on a case-by-case basis when individual pregnant teachers should stop teaching. In many instances qualified replacement teachers are difficult to locate, and, when they are found they reasonably expect a firm date to commence employment, not an uncertain date to be determined in the future by a pregnant teacher and her doctor. Thus, the regulation in the instant case is not, as the petitioner contends, one which is aimed at protecting women, or placing women on a pedestal; rather, it is designed to accommodate the interests of the school in providing continuity of education, the interest of the replacement teacher in having a firm date to report to work, and the interest of the preg-

nant teacher in working up to a time before her delivery which is reasonable for all concerned.

The School Board, and not the teacher, bears the ultimate responsibility for providing quality education to students. The School Board is seriously hampered in discharging this responsibility, however, if it does not have authority to fix uniform rules governing the replacement of teachers who, because of pregnancy, will become unavailable at a fixed point in time.

If the decision about when to take maternity leave were left to each pregnant teacher, the purpose of the regulation would be frustrated. It is easy to imagine cases in which a pregnant school teacher would, for some reason or for no reason, change her mind and discontinue teaching either sooner or later than she originally planned. In either case the element of predictability sought by the School Board has been thwarted, and it is faced either with a replacement teacher and no opening, or an opening and no replacement teacher.

Unquestionably there is not complete predictability under the regulation. A pregnant school teacher could decide, or be required medically, to discontinue teaching in the second or third month of pregnancy. But the regulation seeks to establish a degree of predictability that clearly is lacking where each pregnant teacher controls when her maternity leave will begin. In this case the regulation is simply an effort to minimize the risk of unpredictability, which is essentially what Dr. Kelly said in his testimony.

Respondents submit that the maternity leave policy represents a reasonable method to achieve continuity in education, and it does not result in arbitrary discrimination. While it may not be the perfect solution to the problem, it is the type of problem which is best solved by local officials. As this

Court recently stated in *Rodriguez, supra*, 36 L.Ed. 2d at 48-49:

[E]ducational policy [is] another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education, perhaps even more than welfare assistance, presents a myriad of "intractable economic, social, and even philosophical problems." *Dandridge v. Williams*, 397 U.S. at 487, 25 L. Ed. 2d 491. The very complexity of the problems of financing and managing a statewide public school system suggest that "there will be more than one constitutionally permissible method of solving them," and that, within limits of rationality, "the legislature's efforts to tackle the problems" should be entitled to respect. *Jefferson v. Hackney*, 406 U.S. 535, 546-547, 32 L. Ed. 2d 285, 92 S. Ct. 1724 (1972). On the most basic questions in this area the scholars and educational experts are divided. . . . The ultimate wisdom as to these and related problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues. In such circumstances the judiciary is well advised to refrain from interposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever changing conditions.

ARGUMENT V.

The Fourth Circuit's Exercise Of Discretion Under Rule 40 Of The Federal Rules Of Appellate Procedure Not To Grant Reargument Is Not A Denial Of Due Process Of Law.

The petitioner has created a new issue before this Court. She alleges that the Court of Appeals for the Fourth Circuit denied her due process of law by granting a rehearing *en banc*

without allowing counsel for petitioner to file a brief and make oral argument in opposition.

Rule 40(a) of the Federal Rules of Appellate Procedure provides in part:

No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

The rule clearly provides for the procedure utilized by the court in this case, and an attempt by petitioner to characterize the court's exercise of discretion as a denial of due process is wholly without merit.

Under Rule 35 of the Federal Rules of Appellate Procedure a rehearing *en banc* is not granted unless a majority of the circuit judges who are in regular active service agree that the case warrants a rehearing *en banc*. It is obvious that a majority of the court wished to reconsider this matter, and Rules 40 makes it entirely discretionary with the court to determine how this will be accomplished.

Petitioner complains that she was not allowed to provide additional authorities to the court. Counsel for petitioner has filed two letters in petitioner's brief, one to the Court of Appeals for the Fourth Circuit dated January 9, 1973, and the response thereto from the Clerk dated June 17, 1973. Neither of these two letters are part of the record in this case (see A. 125-128 for docket entries). Coincidentally, counsel for petitioner has left out of the appendix to petitioner's brief letters which were presented to the court by him during the time the court had this matter under consideration. These letters

are attached in the Appendix to this brief, as well as transmittals of these letters by the Clerk to the court. While the case was under consideration counsel "apprised" the court of cases which were viewed as beneficial to his position, yet it is now contended that petitioner was denied the opportunity to advise the court of recent decisions. In point of fact, every case cited in footnote 17 on page 36 of petitioner's brief had been previously furnished to the Court by petitioner. It is clear therefore, that petitioner did in fact furnish additional authorities, although the format was not rearranged granted by the court. Under these circumstances the denial of which petitioner complains is more apparent than real.

CONCLUSION

The respondents submit that the maternity leave regulation of the School Board of Chesterfield County, Virginia violates no right of the petitioner under the Fourteenth Amendment. The decision of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

CHESTERFIELD COUNTY SCHOOL BOARD, and
DR. ROBERT F. KELLY

APPENDIX



App. 1

[Letterhead Omitted]

* * *

June 21, 1972

Received
Jun 22 1972

Clerk, U.S. Court of Appeals
Fourth Circuit
Richmond, Va.

Clerk of Court
United States Court of Appeals
Post Office Building
Richmond, Virginia 23219

Re: Cohen v. Chesterfield County
School Board, et al,
No. 71-1707

Dear Sir:

We have not yet received an opinion in the captioned case. We would like to bring your attention to new decisions which have come down since the time of argument and filing of briefs in this matter. I have enclosed copies for the court of: *Robinson v. Rand*, F. Supp. (D. Colo. March 21, 1972); *Carruth v. Avila*, Superior Court, Maricopa Co., Ariz., CA No. 237274; *Dow, et al v. Osteopathic Hospital of Wichita*, 333 F. Supp. 1357 (D. Kansas 1971); *Williams v. School Dist.*, F. Supp. (N.D. Calif. 1972), 4 FEP Cases 498; *Monell, et al v. Dept. of Social Services of New*

App. 2

York, 71 Civ. 3324 (S.D.N.Y. April 12, 1972); *Danielson v. Bd. of Education of the City University of New York* (S.D. N.Y. April 12, 1972).

Very truly yours,

/s/ Philip J. Hirschkop

NCC:amg

cc: Frederick T. Gray, Esquire
Oliver D. Rudy, Esquire
Ms. Cynthia Edgar, Attorney at Law

[Letterhead Omitted]

June 22, 1972

Honorable Clement F. Haynsworth, Jr.
Chief Judge, Fourth Circuit

Honorable Harrison L. Winter
United States Circuit Judge

Honorable Joseph H. Young
United States District Judge

No. 71-1707, *Cohen v. Chesterfield*

County School Board, et al

App. 3

Gentlemen:

Enclosed is a copy of a letter from Mr. Philip J. Hirschkop, with enclosures, which is self-explanatory.

This case was argued on January 4, 1972.

Respectfully,

Russell W. Riley
Senior Deputy Clerk

RWR/vsl

Enclosures

[Letterhead Omitted]

July 20, 1972

Received
Jul 24 1972

Clerk, U. S. Court of Appeals
Fourth Circuit
Richmond, Va.

The Honorable Sam Phillips, Clerk
United States Court of Appeals
for the Fourth Circuit
Post Office Building
Richmond, Virginia 23219

RE: Cohen v. Chesterfield County School Board, et al
No. 71-1707

Dear Mr. Phillips:

I am in receipt of the letter dated July 3, 1972 to the Clerk of the Court on behalf of the appellants in the above case. That letter brings to the Court's attention the case of *Schattman v. Texas Employment Commission*, which it states I

App. 4

omitted from my statement of recent cases in my letter of June 21. I would like to bring to the Court's attention that by letter of April 28, 1972, the Equal Employment Opportunities Commission, which has entered this case as amicus, brought to the Court's attention the reversal in the *Schattman* case. I enclose a copy of the letter of April 28 to which I refer.

I would also like to bring to the Court's attention another recent case, *Bravo v. Board of Education*, which is reported at 41 Law Week 2029. That decision is very pertinent to the present case and supportive of the position of the appellees in this matter. I enclose three copies of this letter with the original to you for distribution to the three judges which I hereby request be done.

Very truly yours,

/s/ Philip J. Hirschkop

PJH:hns

cc: Samuel W. Hixon, III, Esquire

Frederick T. Gray, Esquire

Cynthia Edgar Gitt, Attorney at Law

Enclosures as stated

App. 5

[Letterhead Omitted]

July 24, 1972

The Honorable Clement F. Haynsworth, Jr.
Chief Judge

The Honorable Harrison L. Winter
United States Circuit Judge

The Honorable Joseph H. Young
United States District Judge

Re: 71-1707 Mrs. Susan Cohen v. Chesterfield County
School Board, et al.

Gentlemen:

Enclosed for your information is a copy of a letter from Mr. Hirschkop dated July 20, 1972, and a copy of a letter from the Equal Employment Opportunity Commission to Mr. Phillips dated April 28, 1972.

The letter July 3 referred to in Mr. Hirschkop's letter was transmitted to you on July 3, 1972.

This case was argued on January 4, 1972.

Respectfully,

Carol R. Lemon
Chief Deputy Clerk

CRL/dhb
Enclosures

App. 6

Equal Employment Opportunity Commission
Washington, D. C. 20506

April 28, 1972

Samuel W. Phillips, Clerk
United States Court of Appeals
for the Fourth Circuit
Richmond, Virginia 23219

Re: *Cohen v. Chesterfield County School Board et. al.*
No. 71-1707

Dear Mr. Phillips:

The Commission would like to call the attention of the Court to two new developments which may affect the Court's decision in the above-styled case.

First, when this case was filed in the District Court and argued on appeal, schoolteachers were specifically exempted from coverage by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* Section 702 of that Act, 42 U.S.C. §2000e-1 provided: "This title shall not apply . . . to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution."

Title VII has now been amended by the Equal Employment Opportunity Act of 1972, P.L. 92-261, which was signed by the President on March 24, 1972, and became *effective immediately*. The language of former Section 702 exempting educational institutions from coverage, has been deleted from the new Section 702. In addition, activities as employers of state governments and political subdivision, are now governed by Sections 701(a) and (b) of the new Act. A copy of those sections as amended is enclosed for the Court's convenience.

App. 7

Thus, schoolteachers are now covered by Title VII. School boards, as political subdivisions, are prohibited from discriminating against employees (including teachers) because of sex, race, color, religion, or national origin.

The second new development is the Commission's passage of guidelines on pregnancy and childbirth, effective April 5, 1972, the date of publication in the Federal Register, 37 F.R. 6837. Under the new guidelines, exclusion of employees "from employment . . . because of pregnancy is in *prima facie* violation of Title VII." 29 C.F.R. 1604.10(a). Indeed, the guidelines require employers to treat disabilities caused by pregnancy and childbirth in the same way that other temporary disabilities are treated. 29 C.F.R. 1604.10(b). These guidelines, which apply to teachers as well as to all other employees, are enclosed for the Court's convenience.

Commission guidelines are entitled to "great difference," *Griggs v. Duke Power Co.*, 401 U.S. 424 91 S.Ct. 849, 855 (1971). And while they do not govern the pending case, they do offer an appropriate standard to use in deciding this case. It would be anomalous to hold that teachers who bring suit under the Equal Protection Clause are entitled to *less* protection against sex discrimination than teachers who bring suit under Title VII.

Finally, the Commission would inform the Court that the Fifth Circuit has recently granted to the Appellants in *Schattman v. Texas Employment Commission*, ____ F.2d ____ (C.A. 5, 1972), a 30-day extension of time to file a Petition for Rehearing. The Commission will participate in those proceed-

App. 8

ings to urge that the decision reached by the majority was incorrect.

Sincerely yours,

/s/ Cynthia E. Gitt

Cynthia E. Gitt

Attorney

Office of the General Counsel

Enclosures

cc:

John B. Mann, Esq.

Philip J. Hirschkop, Esq.

Oliver D. Rudy, Esq.

Morris E. Mason, Esq.

Frederick T. Bray, Esq.

[Letterhead Omitted]

Received

Aug 7 1972

Clerk, U.S. Court of Appeals

Fourth Circuit

Richmond, Va.

August 3, 1972

Clerk,

United States Court of Appeals

Post Office Building

Richmond, Virginia

Re: Cohen v. Chesterfield Co.

No. 71-1707

Dear Sir:

Enclosed please find a copy of the recent opinion in the matter of *LaFleur v. Cleveland Board of Education*. The

App. 9

LaFleur case was the major case upon which the Defendants (Appellants) relied and which now has been reversed. We draw this Courts' attention particularly to the language on page 7 of the Slip Opinion at the bottom regarding the "rule which is inherently based upon a classification by sex" and that "pregnant women teachers have been singled out for unconstitutionally unequal restrictions upon their employment." I am enclosing three copies of the opinion and would appreciate it if they were distributed to the Judge's for their convenience.

Very truly yours,

/s/ Philip J. Hirschkop

Philip J. Hirschkop.

PJH/pm

encl.

cc: S. Hixon, M. Mason

F. T. Gray, J. B. Mann,

J. P. Cooper

[Letterhead Omitted]

August 7, 1972

The Honorable Clement F. Haynsworth, Jr.
Chief Judge, Fourth Circuit

The Honorable Harrison L. Winter
United States Circuit Judge

The Honorable Joseph H. Young
United States District Judge

No. 71-1707—Mrs. Cohen v. Chesterfield County
School Board, et al

App. 10

Gentlemen:

Enclosed is a copy of a letter from Philip J. Hirschkop, Esquire, with attachments which is self-explanatory.

This case was argued on January 4, 1972.

Respectfully,

Russell W. Riley
Senior Deputy Clerk

RWR:fs

Encl.

[Letterhead Omitted]

Received
Jan 2 1973

Clerk, U.S. Court of Appeals
Fourth Circuit
Richmond, Va.

December 29, 1972

The Honorable William K. Slate, Clerk
United States Court of Appeals
Fourth Circuit
Post Office Building
Richmond, Virginia 23219

RE: Cohen v. Chesterfield County School
Board, No. 71-1707

Dear Mr. Slate:

Several months ago, appellants in the captioned matter filed a Petition for Rehearing which is still pending. Since that time, we have brought to the Court's attention several Federal rulings favorable to the appellees, including *LeFleur*

App. 11

v. *Board of Education* in the Sixth Circuit, and District Court opinions in San Francisco (*Williams v. Unified School District*) and Chicago (*Bravo v. Board of Education*). Additionally, we have brought to the Court's attention, the new guidelines of the Equal Employment Opportunity Commission.

We would now like to bring to the Court's attention another recent Federal Court decision exactly on point and favorable to the appellees, *Heath v. Westerville Board of Education*, 345 F.Supp. 501 (S.D. Ohio 1972).

Very truly yours,

/s/ Philip J. Hirschokp by Dan

Philip J. Hirschkop

PJH:hns

cc: Samuel W. Hixon, III, Esquire
Frederick T. Gray, Esquire
Cynthia Edgar Gitt, Attorney at Law

App. 12

[Letterhead Omitted]

January 2, 1973

The Honorable Clement F. Haynsworth, Jr.
Chief Judge

The Honorable Harrison L. Winter
United States Circuit Judge

The Honorable Joseph H. Young
United States Circuit Judge

Re: No. 71-1707 Susan Cohen v. Chesterfield County

Re: School Board

Gentlemen:

Enclosed is a letter from counsel for the appellee which
is self-explanatory.

Respectfully,

Russell W. Riley
Senior Deputy Clerk

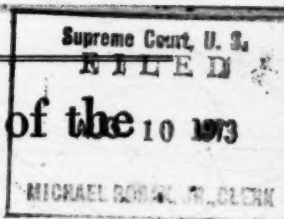
RWR/dhb

Enclosure

cc: The Honorable J. Braxton Craven, Jr.
The Honorable John D. Butzner, Jr.
The Honorable Donald Russell
The Honorable John A. Field, Jr.
The Honorable H. Emory Widener, Jr.



LIBRARY
SUPREME COURT, U. S.



In the Supreme Court of the
United States

OCTOBER TERM, 1972

Nos. 72-777, 72-1129

CLEVELAND BOARD OF EDUCATION, et al., *Petitioners*,

vs.

JO CAROL LA FLEUR, et al., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

SUSAN COHEN, *Petitioner*,

vs.

CHESTERFIELD COUNTY SCHOOL BOARD, et al., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals
for the Fourth Circuit

Brief of the Attorney General of the State of
California, on Behalf of the California Department
of Human Resources Development
As Amicus Curiae

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State of California

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SUBJECT INDEX

	Page
Interest of the State of California	1
Summary of Argument	2
Argument	3
I. Classifications Based on Pregnancy Should Not Be Viewed as Inherently Suspect	3
II. It Is Reasonable to Treat Maternity as a Unique Condition	5
III. The Current EEOC Guidelines Regarding Preg- nancy Are Not Entitled to Judicial Deference....	8
Conclusion	12

TABLE OF AUTHORITIES CITED

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Aiello v. Hansen, No. C-72-1402 SW, (N.D. Cal. May, 1973)	2, 6, 7, 8, 9
A.N.P.A. v. Alexander, 1 FEP Cases 703 (D.C. Cir. 1968)	9
Armendariz v. Hansen, No. C-72-1547 SW, (N.D. Cal. May, 1973)	2
Brennan v. City Stores, Inc., F.2d, 5 EPD ¶ 8634 (5th Cir., 1973)	11
Cohen v. Chesterfield County School Board, 474 F.2d 395 (4th Cir. 1973)	3, 5
Communication Workers v. Illinois Bell Tel. Co., No. 73-C-959 (N.D. Ill. Filed April 13, 1973)	8
Communication Workers v. Southern Bell Tel. & Tel., No. 18328 (N.D. Ga., Filed May 17, 1973)	8
Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), aff'd. per curiam, 402 U.S. 689 (1971)	9
Espinoza v. Farah Mfg. Co., 462 F.2d 1331 (5th Cir. 1972)	9
Frontiero v. Richardson, 93 S.Ct. 1764 (1973)	4
Gilbert v. General Electric Co. No. 142-72-R (E.D. Va., July 25, 1973)	6
Gilbert v. General Electric Co., No. 142-72-R (E.D. Va., Filed March 15, 1973)	8
Griggs et al v. Duke Power Company, 401 U.S. 424 (1971)	11
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iii

	Pages
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Udall v. Tallman, 350 U.S. 792 (1965)	11

STATUTES

California Unemployment Insurance Code, § 2626	6, 7
Civil Rights Act of 1964, Title VII	3, 8, 9, 10
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	Pages
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MISCELLANEOUS

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Executive Order 11246	10
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G. C. Op. Ltr. Feb. 20, 1967, CCH Guide ¶ 17,304.59....	10
Memorandum from John L. Wilks, Director, OFCC, to Agency Heads, November 12, 1970, at 5	10

In the Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72-777, 72-1129

CLEVELAND BOARD OF EDUCATION, et al., *Petitioners*,

VS.

JO CAROL LA FLEUR, et al., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

SUSAN COHEN, *Petitioner*,

VS.

CHESTERFIELD COUNTY SCHOOL BOARD, et al., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals
for the Fourth Circuit

**Brief of the Attorney General of the State of
California, on Behalf of the California Department
of Human Resources Development
As Amicus Curiae**

INTEREST OF THE STATE OF CALIFORNIA

The Attorney General of the State of California files this brief as *amicus curiae* on behalf of the California Department of Human Resources Development. The department is

purposes. What evidence was offered by the Commission to justify its turn about? The Commission did not hold public hearings or invite public debate. It did not suggest that it suddenly devined a heretofore unnoticed Congressional intent. It did not claim to have discovered the law. It simply pronounced its guideline and will seek to win for it judicial approval so that its newest opinion can be raised to the level of judicial fiat.

The *amicus* believes that the Commission's departure from its own precedent can be justified, if at all, only if the Commission proves by persuasive evidence that this radical shift was caused by very good reasons, *e.g.*, a newly announced Congressional purpose directly relating to the Commission's new theory or by facts that did not exist when the Commission pronounced its earlier opinions. Because the Commission at no time has demonstrated that such reasons exist, its departure from its own precedent should not be countenanced by this Court, particularly when the Commission's new opinion will cause substantial changes in employer-employee relations including major revisions in employer benefit programs.

Strong support for the *amicus'* position is found in the Fourth Circuit's opinion of *N. L. R. B. v. Quality Manufacturing Co.*²² and the *amicus* offers that court's well reasoned opinion here as a guide.

In *Quality*, the National Labor Relations Board purporting to interpret the Labor Act held for the first time in its history that an employer violated that Act by discharging an employee who insisted upon union representation at a meeting called by the employer to investigate the employee's conduct. The Court rejected the Board's holding because it "departed from existing case law[.]" and because,

"... never has it been thought, as the Board would hold here, that [statutory] rights require an employer to permit an employee to have a union representative present whenever the employee 'has reasonable ground to fear that the

22. No. 72-1663, decided July 19, 1973 (83 LRRM 2817).

interview will adversely affect his continued employment or even his working conditions.'"

The Court observed that the Board did not justify or support its "new theory" by a persuasive analysis of the Labor Act or of legislative history, and concluded that the Board has no power to "alter or rearrange employer-employee relations to suit its very whim." The parallels between *Quality* and these cases are clear. Both in *Quality* and in these cases, an agency claiming to interpret its statute departed from its own precedent without advancing persuasive reasons for doing so. In both *Quality* and in these cases, the new agency opinion will have considerable impact on employer-employee relations. As did the court in *Quality* this Court should also reject an agency's departure from its own precedents when the agency advances no cogent reasons to justify its shift.

We have seen why this Court should give no weight to the Commission's guideline on pregnancy and childbirth. Moreover, it is apparent that an employer's maternity policy whether pertaining to maternity leave or benefits does not violate Title VII even though pregnant women are treated differently than other employees. Because the Solicitor General and other parties have raised the issues of Title VII of the Civil Rights Act of 1964, the thrust of parts I and II of this brief has been directed to that Act. The *amicus* now turns in part III to the constitutional question raised by the maternity guidelines in these cases.

III.

THE MATERNITY LEAVE REGULATIONS DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

A regulation is measured against the Fourteenth Amendment when it creates a classification of individuals and then treats the individuals in this classification differently than other persons are treated. However, as Justice Frankfurter observed, "classifications is inherent in legislation; the Equal Protection

Clause has not forbidden it.²³ Consistent with these observations, this Court has stated that the Equal Protection Clause does not forbid all statutory classification or discrimination, but only that discrimination that can be called arbitrary or invidious.²⁴ These observations were amplified by the illuminating discussion of Chief Justice Burger in *Reed v. Reed*, *supra*. There, a state statute gave mandatory preference for the male when both a male and a female otherwise equally entitled applied for letters of administration of a decedent's estate. The Chief Justice observed:

"[T]his Court consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. (citations omitted) The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced are treated alike . . .'" at 75-76.

The lower courts, too, have recognized that legislative and administrative enactments may treat different classes of persons in different ways without offending the Equal Protection Clause. In *Williams v. McNair*, 316 F. Supp. 134, 136 (DC DC, 1970) the Court stated:

"The Equal Protection Clause of the Fourteenth Amendment does not require identity of treatment for all citizens, or preclude a state, by legislation, from making classifications and creating differences in the rights of different groups. It is only when the discriminatory treatment and

23. *Morey v. Doud*, 354 U. S. 457, 472 (1975).

24. "The Equal Protection Clause goes no further than the invidious discrimination." *Williamson v. Lee Optical Co.*, 348 U. S. 483, 489 (1955); *Morey v. Doud*, *supra*; *Lindsley v. National Carbonic Gas Co.*, 220 U. S. 61.

varying standards, as created by the legislative or administrative classification are arbitrary and wanting in any rational justification that they offend the Equal Protection Clause." (Citations omitted.)

Because this Court has interpreted the Equal Protection Clause as proscribing only arbitrary and invidious statutory discrimination, this Court has developed tests to determine whether or not a regulation creates an arbitrary or invidious discrimination. These tests may be called the "rational basis" or "compelling state interest" tests and it is to a discussion of this Court's application of these tests that we now turn.

A. This Court Has Utilized the Rational Basis Test and the Compelling State Interest Test to Determine Whether Or Not the Equal Protection Clause Proscribes a Statutory Classification and Discrimination.

The rational basis test has been generally employed when this Court has looked to the Equal Protection Clause in considering the constitutionality of a state's regulation. Under this standard of review, a state legislature is presumed to have acted within its constitutional power and a "legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest."²⁵ The compelling state interest test, considered by this Court to be an exception to the usual standard of review expressed in the rational basis test, has been utilized by this Court only to review legislative enactments that abridged fundamental constitutional rights or that involved classifications that can be labeled as "suspect". This standard of review does not accord to legislative judgments the usual presumption of validity and requires that the state rather than the complainants justify discrimination found in the enactment by showing that a compelling state need is promoted by this discrimination.

25. *Frontiero v. Richardson*, *supra*, 1768 (1973).

1. The Rational Basis Test.

In applying this test, this Court has recognized that states must have a broad scope of discretion in enacting regulations even if these regulations treat different classes of individuals in different ways and has, therefore, deferred to the judgment of the legislators unless the discrimination created by the regulation has absolutely no rational relationship to a legitimate state purpose. This Court has summarized the rules for testing a discrimination under the rational basis test:

"The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon a reasonable base, but is essentially arbitrary."²⁶

Consistent with its pronouncement in *Lindsley*, this Court more recently has observed:

"Indeed, it has long been the law under the 14th Amendment that 'a distinction in legislation is not arbitrary if any state of facts reasonably can be conceived that would sustain it . . . the rule of equality permits many practical inequalities' " (Citations omitted)²⁷

Still more recently in discussing the rational basis test, this Court has stated:

26. *Lindsley v. National Carbonic Gas Co.*, *supra*, at 78-79.

27. *Rapid Transit Corp. v. New York*, 303 U. S. 573 (1938).

"the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their law results in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."²⁸

While under the reasonable basis test, a statutory discrimination will not be invalidated by the Equal Protection Clause if any facts can be conceived that would sustain it, it will not be necessary here, as will be seen below, to search long to discover that the classification in the School Board's maternity leave regulation has a patently rational relationship to the regulation's legitimate purpose. Consequently, as will be argued below, the Board's maternity leave regulation while treating pregnant teachers differently than other teachers does not violate the Fourteenth Amendment.

This Court, then, by applying as a general rule the rational basis test to determine if a discrimination violates the Equal Protection Clause has recognized and acknowledged that it should not sit as a super legislature, but rather, should presume that the states acted within their constitutional powers even though the regulation creates some inequality by treating different classes of persons in different ways. Only in exceptional circumstances has this Court applied the other test—the compelling state interest test—to determine if a statutory classification and discrimination should be avoided by the Equal Protection Clause.

28. *McGowan v. Maryland*, 366 U. S. 420, 425 (1960).

2. The Compelling State Interest Test.

This test has been applied only when a regulation creates a classification which may be judicially regarded as "suspect" or when the regulation may result in an abridgement of a constitutionally guaranteed (or fundamental) right.²⁹ We will consider each of these branches of the compelling interest test in turn.

(a) *The Suspect Classification.*

While it is difficult to formulate a concise definition of a "suspect classification" we learn from the cases that when a statute creates a classification that is based upon "an immutable characteristic determined solely by the accident of birth," and then imposes special disabilities upon members of that classification, the classification has been treated as suspect, subjected to strict judicial scrutiny, and allowed only if shown to be necessary to promote a compelling governmental interest.³⁰ This Court has found that classifications based upon race, alienage, national origin, and sex are inherently suspect because these characteristics frequently bear "no relation to ability to perform or contribute to society."³¹ Thus, when a regulation focused on one racial group and treated this group differently than it treated members of other groups, the racial classification created by the regulation was regarded as constitutionally suspect and was subject to strict scrutiny by this Court.³² Similarly, where the sole basis of a classification created by a statute was the sex of the individuals involved, four Justices found the classification inherently suspect and subjected it to close scrutiny. *Frontiero*

29. *San Antonio Independent School District v. Rodriguez*, 93 S. Ct. 1278 (1973).

30. *Frontiero v. Richardson*, *supra* (1973); *Shapero v. Thompson*, 394 U. S. 618 (1969); *McLaughlin v. Florida*, 379 U. S. 184 (1964); *Graham v. Richardson*, 403 U. S. 365 (1971); *Korematsu v. United States*, 323 U. S. 214, 216 (1944).

31. *Frontiero v. Richardson*, *supra*, at 1770.

32. *McLaughlin v. Florida*, *supra*. There, the color of the skin determined whether there existed a criminal offense.

v. *Richardson, supra*. There, a federal statute commanded "dis-similar for men and women who are . . . similarly situated [,]" by providing that a service woman may not claim her husband as a dependent in order to obtain increased benefits unless he is in fact dependent upon her for over one-half of his support, while a service man may claim his wife as a dependent without regard to whether or not she is dependent upon for him for any part of her support. The *Frontiero* case will be discussed in more detail below as the *amicus* will demonstrate that the classifications created by the maternity leave regulations are not sex based classifications and consequently should not be subjected to strict judicial scrutiny under the compelling state interest test.

This Court has not only employed the compelling state interest test to review statutes which create classifications that are suspect, but also has utilized this test when determining the constitutionality of legislation that prevents the exercise of fundamental constitutional rights. We turn now to cases where this Court has considered whether rights asserted were, in fact, "fundamental" and whether the compelling interest or strict scrutiny test should be employed while reviewing legislative judgments that abridge those rights.

(b) *Fundamental Constitutional Rights.*

In *San Antonio Independent School District v. Rodriguez, supra*, this Court defined a fundamental right as a right that is "explicitly or implicitly guaranteed by the Constitution." In the earlier case of *Shapiro v. Thompson, supra*, Justice Stewart's observations are consistent with those of the Court in *Rodriguez*:

"The Court today does *not* 'pick out particular human activities, characterize them as 'fundamental,' and give them added protection. . . .' To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands." 394 U. S., at 642. (Emphasis from original.)

In practice, this Court has found few rights to be fundamental and has sparingly employed this branch of the compelling interest test when reviewing the constitutionality of legislative enactments. The few rights that this Court has found to be fundamental because they are protected specifically by the Constitution include the right to participate in elections on an equal basis with other citizens in the jurisdiction,³³ the right to travel interstate,³⁴ the right of personal privacy,³⁵ and rights related to First Amendment interests.³⁶ However, this Court has found the following rights not to be fundamental constitutional rights because they are not explicitly or implicitly guaranteed by the Constitution, even though they have been recognized by this Court to be rights of considerable social significance: the right to welfare benefits;³⁷ the right to safe and sanitary housing;³⁸ the right to education;³⁹ and the right to pursue a particular occupation.⁴⁰ In *Dandridge*, this Court recognized that the "administration of public welfare assistance . . . involves the most basic economic needs of impoverished human beings[.]"⁴¹ However, this recognition provided this Court no basis for departing from its traditional (rational basis) method of analysis of legislative classifications involving questions of economic and social policy because the right to welfare benefits while socially significant was not constitutionally guaranteed.

33. *Dunn v. Blumstein*, 407 U. S. 330 (1972).

34. *Shapiro v. Thompson*, *supra*.

35. *Skinner v. Oklahoma, ex rel. Williamson*, 316 U. S. 535 (1942).

36. *Police Department of the City of Chicago v. Mosley*, 408 U. S. 92 (1972).

37. *Dandridge v. Williams*, 397 U. S. 471 (1970).

38. *Lindsey v. Normet*, 405 U. S. 56 (1972).

39. *San Antonio Independent School District v. Rodriguez*, *supra*.

40. *Williamson v. Lee Optical Co.*, *supra*; *Kotch v. Board of River Port Pilot Commissioners*, 330 U. S. 552 (1947).

41. *Dandridge v. Williams* at 485.

Similarly, in *Lindsey*, this Court recognized the importance of decent, safe and sanitary housing but stated:

"... the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease, without the payment of rent. . . . Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions." at 74.

In *Rodriguez*, this Court stated:

"Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation."

The lesson of the cases discussed in this sub-part is plain:

First, a suspect classification does not exist unless a regulation creates a classification that is based upon "an immutable characteristic determined solely by accident of birth," and then imposes special disabilities upon members of that classification.

Second, this Court will neither create substantive constitutional rights in order to guarantee them equal protection of the laws, nor subject state legislation to strict scrutiny because this legislation is of social significance. Rather, individual interests are characterized as fundamental and given added protection only if the right to pursue these activities is explicitly or implicitly guaranteed by the Constitution.

Third, unless a legislative enactment abridges fundamental constitutional rights or involves suspect classifications, this Court will employ the rational basis or traditional Equal Protection

analysis in determining whether or not a legislative classification is constitutional. Under this test, "a legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest."⁴²

Because the maternity leave regulations neither involves a suspect classification nor prevents the exercise of a fundamental constitutional right, the Court should employ the rational basis or traditional test to evaluate the constitutionality of the classification created by these regulations and find that the classification does not offend the Equal Protection Clause. To this argument we now turn.

B. The Maternity Leave Regulations Do Not Violate the Equal Protection Clause of the Fourteenth Amendment.

1. The Maternity Leave Regulations Do Not Create or Involve a Suspect Classification.

In *Frontiero v. Richardson*, *supra*, this Court stated, "that classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny." At 1768. This Court went on to explain that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth . . . And what differentiates sex from such non-suspect statutes as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." at 1770.

Sex, then, is considered to be a suspect classification because it is an immutable characteristic determined solely by the accident of birth and because it bears no relation to ability to perform or contribute to society. Unlike sex, pregnancy is not an immutable characteristic and it cannot be said that pregnancy bears no relation to ability to perform or to contribute to society. Consequently, following the reasoning in *Frontiero* it is clear

42. *Frontiero v. Richardson*, *supra*, at 1768.

that pregnancy cannot be a suspect classification even though sex, race, and national origin may be.

The basis of the holding in *Frontiero* is a further reason to distinguish that case from the instant case. In *Frontiero*, this Court added:

"... any statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution] . . .'. We therefore conclude that, by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the due process clause of the Fifth Amendment in so far as they require a female member to the dependency of her husband." at 1772.

Under the rationale of *Frontiero*, then, a regulation that treats men and women differently, would violate the Fourteenth Amendment only if it were maintained for the sole purpose of achieving administrative convenience. In the instant case, not only is the classification created by the maternity regulation not sex based or suspect, but as a further distinction between this case and *Frontiero*, the purpose of the maternity regulation is not administrative convenience. Rather, as will be discussed below, the main purpose for the maternity regulation is the need to preserve the continuity of education in the classroom. Consequently, because administrative convenience is not the primary purpose of the maternity regulation, following *Frontiero*, the regulation does not violate the Equal Protection Clause even assuming *arguendo* it treats males and females differently.⁴³ Because pregnancy, unlike sex, is not a suspect

43. The *amicus* contends that discrimination based upon a sex classification can occur only when the two sexes are in actual or potential competition. The maternity leave regulation does not involve competition between men and women and consequently does not treat men and women who are similarly situated differently. For this additional reason, the maternity regulation does not violate the Equal Protection Clause. *Reed v. Reed*, *supra*.

classification, the compelling interest test can be utilized to review the constitutionality of maternity regulation only if that regulation abridges a fundamental constitutional right.

2. The Maternity Leave Regulations Do Not Abridge a Fundamental Constitutional Right.

This Court in rejecting the opportunity to create "substantive constitutional rights in the name of guaranteeing equal protection of the laws [,]" has stated that the key to discovering whether a right is "fundamental" lies not in its social significance but rather in determining whether the right is explicitly or implicitly guaranteed by the Constitution.⁴⁴ This Court has held that neither education nor the right to employment is a fundamental constitutional right. In *Rodriguez*, this Court stated that

"Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." at 1297.

In *Dandridge v. Williams*, *supra*, this Court recognized that the usual rational basis standard was to be employed when evaluating the constitutionality of state legislation that restricted the availability of employment opportunities. This recognition indicates that the right to employment opportunities is not a fundamental constitutional right requiring added protection by the application of the compelling interest test. *Dandridge* cited with approval *Goesaert v. Clarie*, 335 U. S. 464 (1948) and *Kotch v. Board of River Port Pilot Commissioners*, 330 U. S. 552 (1947). In *Goesaert*, this Court upheld a state statute prohibiting women other than wives and daughters of bar owners from becoming bar maids.

Consistent with the opinions of this Court is the Sixth Circuit's opinion in *Orr v. Trinter*, 444 F. 2d 128 (1971) cert. denied

44. *San Antonio Independent School District v. Rodriguez*, *supra*, at 1297.

408 U. S. 943 (1972), rehearing denied U. S. In *Orr*, a public school teacher alleged that his constitutional rights were violated because the School Board without reason refused to renew his teaching contract. He asserted that the Fourteenth Amendment prevented the State from depriving him of life, liberty and property without due process. While this was a case arising under the Due Process Clause, the court nonetheless in a statement relative to these proceedings held that there is "no constitutionally protected right to government employment." at 133, 134.⁴⁵

Because there is no fundamental constitutional right involved in this case, the argument of respondents that the maternity regulation is over-broad and therefore unconstitutional because it applies uniformly to all pregnant teachers, regardless of individual ability to teach, has no place in this case. As this court observed in *Dandridge v. Williams*, *supra*,

"If this were a case involving government action claimed to violate the First Amendment guarantee of free speech, a finding of 'overreaching' would be significant and might be crucial. For when otherwise valid governmental regulation sweeps so broadly as to impinge upon activity protected by the First Amendment, its very overbreadth may make it unconstitutional. See, e.g., *Shelton v. Tucker*, 364 U. S. 479. But the concept of 'overreaching' has no place in this case. For here we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families. For this Court to approve the invalidation of state economic or social regulation as 'overreaching' would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise,

45. Even if the right to employment may be considered as the means to obtain food, clothing, shelter and medical care, this would not enable it to be classified as a fundamental constitutional right. *Goldberg v. Kelly*, 397 U. S. 254 (1970).

improvident, or out of harmony with a particular school of thought.' *Williamson v. Lee Optical Co.*, 348 U. S. 483, 488. That era long ago passed in to history. *Ferguson v. Skrupa*, 372 U. S. 726.

"In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' *Metropolis Theatre Co. v. City of Chicago*, 228 U. S. 61, 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan v. Maryland*, 366 U. S. 420, 426."

We have seen that the maternity leave regulations do not operate to the disadvantage of a suspect class or abridge fundamental constitutional rights. Therefore, strict judicial scrutiny is not required. Nonetheless, the maternity leave regulations must be examined to determine if they rationally further a legitimate state purpose and, therefore, do not constitute invidious discrimination in violation of the Equal Protection Clause. To this examination we now turn.

3. The Maternity Leave Regulations Do Not Violate the Equal Protection Clause When the Traditional or Reasonable Basis Standard of Review Is Employed to Evaluate Their Constitutionality.

As this Court stated, "Under 'traditional' equal protection analysis, a legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest." *Frontiero v. Richardson*, *supra*, at 1768. The rational basis test then employs three standards: first, a legitimate governmental purpose must be found to exist;

second, the classification created by the statute must be rationally related to and further this legitimate governmental interest; third, all persons within the class must be treated alike.⁴⁶

A School Board has an overriding and fundamental concern to educate students within its jurisdiction and if necessary can enact regulations to further this function. A maternity regulation furthers this legitimate interest because it assures that "sudden disruption of the students' classroom program due to an unforeseen complication in the teacher's condition will be minimized." *La Fleur v. Cleveland Board of Education*, 326 F. Supp. 1208, 1213 (1971). That court continued:

"The requirement of advance notice of termination also allows time for a substitute teacher to work and train with the intended class prior to assuming her full responsibilities, further maintaining continuity in the classroom program. The provision for resumption of employment after the child's birth serves the purposes of maintaining classroom continuity and protecting the health of the mother and child."

Moreover, that court observed:

"This regulation has minimized the classroom distractions and disruptions which had occurred prior to its adoption, further attesting to its necessity and reasonableness, and this court so finds.

"The problem of the teacher's health and safety, before and after the child's birth, is of itself a valid concern of the school board aside from its interest in the students' education.

"In an environment where the possibility of violence and accident exists, pregnancy greatly magnifies the probability of serious injury."

It is clear therefore that the maternity regulations meet the standards of the traditional or reasonable basis test and the

46. *United States Department of Agriculture v. Moreno*, 93 S. Ct. 2821 (1973); *F. S. Royster Guano Co. v. Virginia*, 253 U. S. 412 (1920); *Frontiero v. Richardson*, *supra*.

classification created by the regulations does not violate the Equal Protection Clause even though the regulations result in different classes of persons being treated in different ways. The crucial question posed by this Court⁴⁷ for equal protection cases of "whether there is an appropriate governmental interest suitably furthered by the differential treatment [,]" must be answered here in the affirmative.

While the Cleveland School Board required an unpaid leave of absence from school duties beginning five months before the expected delivery and the Chesterfield County School Board required employment to terminate four months prior to the date of expected birth, this difference merely reflects the individual judgment of each School Board. Such legislative discretion has been respected by this Court.

"In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results, in some inequality.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' *Metropolis Theatre Co. v. City of Chicago*, 228 U. S. 61, 69-70."

Whether a School Board should require a leave of absence to begin four or five months before the date of expected delivery is a matter of local concern and depends upon the availability of capable future substitutes and the particular classroom environment. Application of the reasonable basis test by this Court when it determines the constitutionality of a School Board's regulation will allow the local board to continue to exercise this discretion in a manner calculated to achieve maximum classroom continuity. However, application of the stricter standard

47. *Police Department v. Mosley*, 408 U. S. 92, 95 (1972).

of review may well require a School Board to forego the goal of classroom continuity and to accommodate the individual teaching desires of each pregnant teacher. Therefore, because the primary duty of a School Board is to educate students and to provide continuity in the classroom to further this function, this Court should apply the rational basis test when it evaluates the constitutionality of a School Board's maternity leave regulations. When this test is applied to the regulations here, their constitutionality is assured.

CONCLUSION.

It is respectfully submitted for the foregoing reasons that this Court should affirm the decision of the Fourth Circuit and reverse the decision of the Sixth Circuit.

Respectfully submitted,

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CLEVELAND BOARD OF EDUCATION ET AL. v.
LAFLEUR ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

No. 72-777. Argued October 15, 1973—Decided January 21, 1974*

Pregnant public school teachers brought these actions under 42 U. S. C. § 1983 challenging the constitutionality of mandatory maternity leave rules of the Cleveland, Ohio (No. 72-777), and Chesterfield County, Virginia (No. 72-1129), School Boards. The Cleveland rule requires a pregnant school teacher to take unpaid maternity leave five months before the expected childbirth, with leave application to be made at least two weeks before her departure. Eligibility to return to work is not accorded until the next regular semester after her child is three months old. The Chesterfield County rule requires the teacher to leave work at least four months, and to give notice at least six months, before the anticipated childbirth. Re-employment is guaranteed no later than the first day of the school year after the date she is declared re-eligible. Both schemes require a physician's certificate of physical fitness prior to the teacher's return. Each Court of Appeals reversed the court below, one holding the Chesterfield County maternity leave rule constitutional, the other holding the Cleveland rule unconstitutional. *Held*:

1. The mandatory termination provisions of both maternity rules violate the Due Process Clause of the Fourteenth Amendment. Pp. 639-648.

(a) The arbitrary cutoff dates (which obviously come at different times of the school year for different teachers) have no valid relationship to the State's interest in preserving continuity of instruction, as long as the teacher is required to give substantial advance notice that she is pregnant. Pp. 639-643.

(b) The challenged provisions are violative of due process since they create a conclusive presumption that every teacher who is four or five months pregnant is physically incapable of

*Together with No. 72-1129, *Cohen v. Chesterfield County School Board et al.*, on certiorari to the United States Court of Appeals for the Fourth Circuit.

continuing her duties, whereas any such teacher's ability to continue past a fixed pregnancy period is an individual matter; and the school boards' administrative convenience alone cannot suffice to validate the arbitrary rules. Pp. 643-648.

2. The Cleveland three-month return provision also violates due process, being both arbitrary and irrational. It creates an irrebuttable presumption that the mother (whose good health must be medically certified) is not fit to resume work, and it is not germane to maintaining continuity of instruction, as the precise point a child will reach the relevant age will occur at a different time throughout the school year for each teacher. Pp. 648-650.

3. The Chesterfield County return rule, which is free of any unnecessary presumption, comports with due process requirements. P. 650.

No. 72-777, 465 F. 2d 1184, affirmed; No. 72-1129, 474 F. 2d 395, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., concurred in the result. POWELL, J., filed an opinion concurring in the result, *post*, p. 651. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 657.

Charles F. Clarke argued the cause and filed a brief for petitioners in No. 72-777. *Philip J. Hirschkop* argued the cause for petitioner in No. 72-1129. With him on the brief was *John B. Mann*.

Jane M. Picker argued the cause for respondents in No. 72-777. With her on the brief were *Rita Page Reuss* and *Sidney Picker, Jr.* *Samuel W. Hixon III* argued the cause for respondents in No. 72-1129. With him on the brief was *Frederick T. Gray*.†

†*Andrew J. Ruzicho* filed a brief for the International Association of Official Human Rights Agencies as *amicus curiae* urging affirmance in No. 72-777. *Philip J. Tierney* filed a brief for the Maryland Commission on Human Relations as *amicus curiae* urging reversal in No. 72-1129. Briefs of *amici curiae* urging affirmance in No. 72-1129 were filed by *Andrew P. Miller*, Attorney General, and *Walter H. Ryland*, Assistant Attorney General, for the Commonwealth of Vir-

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondents in No. 72-777 and the petitioner in No. 72-1129 are female public school teachers. During the 1970-1971 school year, each informed her local school board that she was pregnant; each was compelled by a mandatory maternity leave rule to quit her job without pay several months before the expected birth of her child. These cases call upon us to decide the constitutionality of the school boards' rules.

I

Jo Carol LaFleur and Ann Elizabeth Nelson, the respondents in No. 72-777, are junior high school teachers employed by the Board of Education of Cleveland, Ohio. Pursuant to a rule first adopted in 1952, the school board requires every pregnant school teacher to take maternity leave without pay, beginning five months before the expected birth of her child. Application for such leave must be made no later than two weeks prior to the date of departure. A teacher on maternity leave is not allowed

ginia, and by Gordon Dean Booth, Jr., Richard S. Maurer, and Sidney F. Davis for Delta Air Lines, Inc. Briefs of *amici curiae* urging reversal in No. 72-1129 and affirmance in No. 72-777 were filed by Solicitor General Bork, Assistant Attorney General Pottinger, Louis F. Claiborne, Joseph T. Eddins, and Beatrice Rosenberg for the United States; by David Rubin and Jerry D. Anker for the National Education Assn. et al.; by Winn Newman and Ruth Weyand for the International Union of Electrical, Radio and Machine Workers, AFL-CIO; by Theodore R. Mann, Joseph B. Robison, Sylvia Roberts, Ruth Bader Ginsburg, Melvin L. Wulf, and John Lichtenberg for the American Civil Liberties Union et al.; and by Paul O. H. Pigman for Margaret M. Broussard. Evelle J. Younger, Attorney General, Elizabeth Palmer, Assistant Attorney General, and Joanne Condas, Deputy Attorney General, filed a brief for the California Department of Human Resources Development as *amicus curiae*.

to return to work until the beginning of the next regular school semester which follows the date when her child attains the age of three months. A doctor's certificate attesting to the health of the teacher is a prerequisite to return; an additional physical examination may be required. The teacher on maternity leave is not promised re-employment after the birth of the child; she is merely given priority in reassignment to a position for which she is qualified. Failure to comply with the mandatory maternity leave provisions is ground for dismissal.¹

¹ The Cleveland rule provides:

"Any married teacher who becomes pregnant and who desires to return to the employ of the Board at a future date may be granted a maternity leave of absence without pay.

"**APPLICATION** A maternity leave of absence shall be effective not less than *five (5) months before the expected date* of the normal birth of the child. Application for such leave shall be forwarded to the Superintendent at least *two (2) weeks before the effective date of the leave of absence*. A leave of absence without pay shall be granted by the Superintendent for a period not to exceed *two (2) years*.

"**REASSIGNMENT** A teacher may return to service from maternity leaves not earlier than the *beginning of the regular school semester which follows the child's age of three (3) months*. In unusual circumstances, exceptions to this requirement may be made by the Superintendent with the approval of the Board. *Written request* for return to service from maternity leave must reach the Superintendent at least *six (6) weeks prior to the beginning of the semester when the teacher expects to resume teaching* and shall be accompanied by a doctor's certificate stating the health and physical condition of the teacher. The Superintendent may require an additional physical examination.

"When a teacher qualifies to return from maternity leave, she shall have priority in reassignment to a vacancy for which she is qualified under her certificate, but she shall not have prior claim to the exact position she held before the leave of absence became effective.

"A teacher's failure to follow the above rules for maternity leave of absence shall be construed as termination of contract or as grounds for dismissal." (Emphasis in original.)

Neither Mrs. LaFleur nor Mrs. Nelson wished to take an unpaid maternity leave; each wanted to continue teaching until the end of the school year.² Because of the mandatory maternity leave rule, however, each was required to leave her job in March 1971.³ The two women then filed separate suits in the United States District Court for the Northern District of Ohio under 42 U. S. C. § 1983, challenging the constitutionality of the maternity leave rule. The District Court tried the cases together, and rejected the plaintiffs' arguments. 326 F. Supp. 1208. A divided panel of the United States Court of Appeals for the Sixth Circuit reversed, finding the Cleveland rule in violation of the Equal Protection Clause of the Fourteenth Amendment.⁴ 465 F. 2d 1184.

The petitioner in No. 72-1129, Susan Cohen, was employed by the School Board of Chesterfield County, Virginia. That school board's maternity leave regulation requires that a pregnant teacher leave work at least four months prior to the expected birth of her child. Notice

² Mrs. LaFleur's child was born on July 28, 1971; Mrs. Nelson's child was born during August of that year.

³ Effective February 1, 1971, the Cleveland regulation was amended to provide that only teachers with one year of continuous service qualified for maternity leave; teachers with less than one year were required to resign at the beginning of the fifth month of pregnancy. Since Mrs. Nelson had less than a year of service at the time she notified her principal that she was pregnant, the school board originally required her to resign her teaching position. The school board has since conceded that the February 1 amendment did not apply to Mrs. Nelson, since it was enacted after her contract of employment was executed. Pursuant to that concession, the board has placed Mrs. Nelson, like Mrs. LaFleur, on mandatory leave.

⁴ Chief Judge Phillips filed a separate opinion, dissenting in part and concurring in part. He felt that the portion of the challenged regulation requiring maternity leave at the beginning of the fifth month of pregnancy was constitutional; he agreed with the majority, however, that the three-month post-delivery waiting period before becoming eligible to return to teaching was unconstitutional.

in writing must be given to the school board at least six months prior to the expected birth date. A teacher on maternity leave is declared re-eligible for employment when she submits written notice from a physician that she is physically fit for re-employment, and when she can give assurance that care of the child will cause only minimal interference with her job responsibilities. The teacher is guaranteed re-employment no later than the first day of the school year following the date upon which she is declared re-eligible.⁵

⁵ The Chesterfield County rule provides:

"MATERNITY PROVISIONS

"a. Notice in writing must be given to the School Board at least six (6) months prior to the date of expected birth.

"b. Termination of employment of an expectant mother shall become effective at least four (4) months prior to the expected birth of the child. Termination of employment may be extended if the superintendent receives written recommendations from the expectant mother's physician and her principal, and if the superintendent feels that an extension will be in the best interest of the pupils and school involved.

"c. Maternity Leave

"(1) Maternity leave must be requested in writing at the time of termination of employment.

"(2) Maternity leave will be granted only to those persons who have a record of satisfactory performance.

"(3) An individual will be declared eligible for re-employment when she submits written notice from her physician that she is physically fit for full-time employment and when she can give full assurance that care of the child will cause minimal interference with job responsibilities.

"(4) Re-employment will be guaranteed no later than the first day of the school year following the date that the individual was declared eligible for re-employment.

"(5) All personnel benefits accrued, including seniority, will be retained during maternity leave unless the person concerned shall have accepted other employment.

"(6) The school system will have discharged its responsibility under this policy after offering re-employment for the first vacancy

Opinion of the Court

414 U.S.

Mrs. Cohen informed the Chesterfield County School Board in November 1970, that she was pregnant and expected the birth of her child about April 28, 1971.⁶ She initially requested that she be permitted to continue teaching until April 1, 1971.⁷ The school board rejected the request, as it did Mrs. Cohen's subsequent suggestion that she be allowed to teach until January 21, 1971, the end of the first school semester. Instead, she was required to leave her teaching job on December 18, 1970. She subsequently filed this suit under 42 U. S. C. § 1983 in the United States District Court for the Eastern District of Virginia. The District Court held that the school board regulation violates the Equal Protection Clause, and granted appropriate relief. 326 F. Supp. 1159. A divided panel of the Fourth Circuit affirmed, but, on rehearing en banc, the Court of Appeals upheld the constitutionality of the challenged regulation in a 4-3 decision. 474 F. 2d 395.

We granted certiorari in both cases, 411 U. S. 947, in order to resolve the conflict between the Courts of Appeals regarding the constitutionality of such mandatory maternity leave rules for public school teachers.⁸

that occurs after the individual has been declared eligible for re-employment."

⁶ Mrs. Cohen's child was in fact born on May 2.

⁷ Unlike the Cleveland rule, n. 1, *supra*, the Chesterfield County regulation allows the superintendent of schools to extend a teacher's employment beyond the normal cutoff date, if he determines that such action is in the best interests of the students and school involved. See n. 5, *supra*.

⁸ Apart from the cases here under review, there are at least three other reported federal appellate opinions dealing with the constitutionality of mandatory maternity leave regulations. Compare *Green v. Waterford Board of Education*, 473 F. 2d 629 (CA2), and *Buckley v. Coyle Public School System*, 476 F. 2d 92 (CA10) (both invalidating mandatory leave rules for pregnant public school teachers)

II

This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause

with *Schattman v. Texas Employment Comm'n*, 459 F. 2d 32 (CA5) (upholding a leave policy of a state agency).

For opinions of the district courts dealing with mandatory maternity leaves, see, e. g., *Heath v. Westerville Board of Education*, 345 F. Supp. 501 (SD Ohio); *Pocklington v. Duval County School Board*, 345 F. Supp. 163 (MD Fla.); *Bravo v. Board of Education of the City of Chicago*, 345 F. Supp. 155 (ND Ill.); *Williams v. San Francisco Unified School District*, 340 F. Supp. 438 (ND Cal.); *Seaman v. Spring Lake Park Independent School District*, 368 F. Supp. 944 (Minn.); *Monell v. Department of Social Services*, 357 F. Supp. 1051 (SDNY).

Cf. *Struck v. Secretary of Defense*, 460 F. 2d 1372 (CA9), cert. granted, 409 U. S. 947, vacated and remanded to consider the issue of mootness, 409 U. S. 1071; *Gutierrez v. Laird*, 346 F. Supp. 289 (DC); *Robinson v. Rand*, 340 F. Supp. 37 (Colo.) (all dealing with Air Force regulations requiring separation of pregnant personnel).

The practical impact of our decision in the present cases may have been somewhat lessened by several recent developments. At the time that the teachers in these cases were placed on maternity leave, Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U. S. C. § 2000e *et seq.*, did not apply to state agencies and educational institutions. 42 U. S. C. §§ 2000e (b) and 2000e-1. On March 24, 1972, however, the Equal Employment Opportunity Act of 1972 amended Title VII to withdraw those exemptions. Pub. L. 92-261, 86 Stat. 103. Shortly thereafter, the Equal Employment Opportunity Commission promulgated guidelines providing that a mandatory leave or termination policy for pregnant women presumptively violates Title VII. 29 CFR § 1604.10, 37 Fed. Reg. 6837. While the statutory amendments and the administrative regulations are, of course, inapplicable to the cases now before us, they will affect like suits in the future.

In addition, a number of other federal agencies have promulgated regulations similar to those of the Equal Employment Opportunity Commission, forbidding discrimination against pregnant workers with regard to sick leave policies. See, e. g., 5 CFR § 630.401 (b) (Civil

of the Fourteenth Amendment. *Roe v. Wade*, 410 U. S. 113; *Loving v. Virginia*, 388 U. S. 1, 12; *Griswold v. Connecticut*, 381 U. S. 479; *Pierce v. Society of Sisters*, 268 U. S. 510; *Meyer v. Nebraska*, 262 U. S. 390. See also *Prince v. Massachusetts*, 321 U. S. 158; *Skinner v. Oklahoma*, 316 U. S. 535. As we noted in *Eisenstadt v. Baird*, 405 U. S. 438, 453, there is a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

By acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms. Because public school maternity leave rules directly affect "one of the basic civil rights of man," *Skinner v. Oklahoma*, *supra*, at 541, the Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty. The question before us in these cases is whether the interests advanced in support of the rules of the Cleveland and Chesterfield County School Boards can justify the particular procedures they have adopted.

The school boards in these cases have offered two essentially overlapping explanations for their mandatory maternity leave rules. First, they contend that the firm cutoff dates are necessary to maintain continuity of classroom instruction, since advance knowledge of when

Service Commission); 41 CFR § 60-20.3 (g) (Office of Federal Contract Compliance). See generally Koontz, *Childbirth and Child Rearing Leave: Job-Related Benefits*, 17 N. Y. L. F. 480, 487-490; Comment, *Love's Labors Lost: New Conceptions of Maternity Leaves*, 7 Harv. Civ. Rights-Civ. Lib. L. Rev. 260, 280-281. We, of course, express no opinion as to the validity of any of these regulations.

a pregnant teacher must leave facilitates the finding and hiring of a qualified substitute. Secondly, the school boards seek to justify their maternity rules by arguing that at least some teachers become physically incapable of adequately performing certain of their duties during the latter part of pregnancy. By keeping the pregnant teacher out of the classroom during these final months, the maternity leave rules are said to protect the health of the teacher and her unborn child, while at the same time assuring that students have a physically capable instructor in the classroom at all times.⁹

It cannot be denied that continuity of instruction is a significant and legitimate educational goal. Regulations requiring pregnant teachers to provide early notice of their condition to school authorities undoubtedly facilitate administrative planning toward the important

⁹ The records in these cases suggest that the maternity leave regulations may have originally been inspired by other, less weighty, considerations. For example, Dr. Mark C. Schinnerer, who served as Superintendent of Schools in Cleveland at the time the leave rule was adopted, testified in the District Court that the rule had been adopted in part to save pregnant teachers from embarrassment at the hands of giggling schoolchildren; the cutoff date at the end of the fourth month was chosen because this was when the teacher "began to show." Similarly, at least several members of the Chesterfield County School Board thought a mandatory leave rule was justified in order to insulate schoolchildren from the sight of conspicuously pregnant women. One member of the school board thought that it was "not good for the school system" for students to view pregnant teachers, "because some of the kids say, my teacher swallowed a water melon, things like that."

The school boards have not contended in this Court that these considerations can serve as a legitimate basis for a rule requiring pregnant women to leave work; we thus note the comments only to illustrate the possible role of outmoded taboos in the adoption of the rules. Cf. *Green v. Waterford Board of Education*, 473 F. 2d, at 635 ("Whatever may have been the reaction in Queen Victoria's time, pregnancy is no longer a dirty word").

objective of continuity. But, as the Court of Appeals for the Second Circuit noted in *Green v. Waterford Board of Education*, 473 F. 2d 629, 635:

"Where a pregnant teacher provides the Board with a date certain for commencement of leave . . . that value [continuity] is preserved; an arbitrary leave date set at the end of the fifth month is no more calculated to facilitate a planned and orderly transition between the teacher and a substitute than is a date fixed closer to confinement. Indeed, the latter . . . would afford the Board more, not less, time to procure a satisfactory long-term substitute." (Footnote omitted.)

Thus, while the advance-notice provisions in the Cleveland and Chesterfield County rules are wholly rational and may well be necessary to serve the objective of continuity of instruction, the absolute requirements of termination at the end of the fourth or fifth month of pregnancy are not. Were continuity the only goal, cut-off dates much later during pregnancy would serve as well as or better than the challenged rules, providing that ample advance notice requirements were retained. Indeed, continuity would seem just as well attained if the teacher herself were allowed to choose the date upon which to commence her leave, at least so long as the decision were required to be made and notice given of it well in advance of the date selected.¹⁰

In fact, since the fifth or sixth month of pregnancy

¹⁰ It is, of course, possible that either premature childbirth or complications in the later stages of pregnancy might upset even the most careful plans of the teacher, the substitute, and the school board. But there is nothing in these records to indicate that such emergencies could not be handled, as are all others, through the normal use of the emergency substitute teacher process. See *Green*, *supra*, at 635-636.

will obviously begin at different times in the school year for different teachers, the present Cleveland and Chesterfield County rules may serve to hinder attainment of the very continuity objectives that they are purportedly designed to promote. For example, the beginning of the fifth month of pregnancy for both Mrs. LaFleur and Mrs. Nelson occurred during March of 1971. Both were thus required to leave work with only a few months left in the school year, even though both were fully willing to serve through the end of the term.¹¹ Similarly, if continuity were the only goal, it seems ironic that the Chesterfield County rule forced Mrs. Cohen to leave work in mid-December 1970 rather than at the end of the semester in January, as she requested.

We thus conclude that the arbitrary cutoff dates embodied in the mandatory leave rules before us have no rational relationship to the valid state interest of preserving continuity of instruction. As long as the teachers are required to give substantial advance notice of their condition, the choice of firm dates later in pregnancy would serve the boards' objectives just as well, while imposing a far lesser burden on the women's exercise of constitutionally protected freedom.

The question remains as to whether the cutoff dates at the beginning of the fifth and sixth months can be justified on the other ground advanced by the school boards—the necessity of keeping physically unfit teachers out of the classroom. There can be no doubt that such an objective is perfectly legitimate, both on educational and safety grounds. And, despite the plethora of conflicting medical testimony in these cases, we can as-

¹¹ Indeed, it is somewhat difficult to view the Cleveland mandatory leave rule as seriously furthering the goal of continuity, since the rules require only two weeks' advance notice before the leave is to commence.

sume, *arguendo*, that at least some teachers become physically disabled from effectively performing their duties during the latter stages of pregnancy.

The mandatory termination provisions of the Cleveland and Chesterfield County rules surely operate to insulate the classroom from the presence of potentially incapacitated pregnant teachers. But the question is whether the rules sweep too broadly. See *Shelton v. Tucker*, 364 U. S. 479. That question must be answered in the affirmative, for the provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination by the teacher's doctor—or the school board's—as to any particular teacher's ability to continue at her job. The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary.

As the Court noted last Term in *Vlandis v. Kline*, 412 U. S. 441, 446, "permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." In *Vlandis*, the Court declared unconstitutional, under the Due Process Clause of the Fourteenth Amendment, a Connecticut statute mandating an irrebuttable presumption of non-residency for the purposes of qualifying for reduced tuition rates at a state university. We said in that case, *id.*, at 452:

"[I]t is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of non-residence, when that presumption is not necessarily or universally true in fact, and when the State has

reasonable alternative means of making the crucial determination."

Similarly, in *Stanley v. Illinois*, 405 U. S. 645, the Court held that an Illinois statute containing an irrebuttable presumption that unmarried fathers are incompetent to raise their children violated the Due Process Clause. Because of the statutory presumption, the State took custody of all illegitimate children upon the death of the mother, without allowing the father to attempt to prove his parental fitness. As the Court put the matter:

"It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children." *Id.*, at 654 (footnotes omitted).

Hence, we held that the State could not conclusively presume that any particular unmarried father was unfit to raise his child; the Due Process Clause required a more individualized determination. See also *United States Dept. of Agriculture v. Murry*, 413 U. S. 508; *id.*, at 514-517 (concurring opinion); *Bell v. Burson*, 402 U. S. 535; *Carrington v. Rash*, 380 U. S. 89.

These principles control our decision in the cases before us. While the medical experts in these cases differed on many points, they unanimously agreed on one—the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter.¹² Even assuming, *arguendo*, that

¹² There were three medical witnesses in the Cleveland case: Dr. Sarah Marcus and Dr. Veners Rutenbeigs (Mrs. Nelson's obstetrician), who testified on behalf of the respondents, and Dr. William C.

Opinion of the Court

414 U.S.

there are some women who would be physically unable to work past the particular cutoff dates embodied in the challenged rules, it is evident that there are large numbers of teachers who are fully capable of continuing work for longer than the Cleveland and Chesterfield County regulations will allow. Thus, the conclusive presumption embodied in these rules, like that in *Vlandis*, is neither "necessarily [nor] universally true," and is violative of the Due Process Clause.

The school boards have argued that the mandatory termination dates serve the interest of administrative convenience, since there are many instances of teacher pregnancy, and the rules obviate the necessity for case-by-case determinations. Certainly, the boards have an interest in devising prompt and efficient procedures to achieve their legitimate objectives in this area. But, as the Court stated in *Stanley v. Illinois*, *supra*, at 656:

"[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy govern-

Weir, the petitioners' expert. While Dr. Weir generally disagreed with his colleagues on the potential effects of pregnancy on a teacher's job performance, he noted that each pregnancy was an individual matter, and should be prescribed for as such. Similarly, the two medical experts in the Chesterfield County case, Dr. Leo J. Dunn and Dr. David C. Forrest, testified that each particular pregnancy must be managed as an individual matter. Cf. R. Benson, *Handbook of Obstetrics & Gynecology* 109 (4th ed. 1971); Curran, *Equal Protection of the Law: Pregnant School Teachers*, 285 *New England J. Medicine* 336; Comment, *Mandatory Maternity Leave of Absence Policies—An Equal Protection Analysis*, 45 *Temp. L. Q.* 240, 245.

ment officials no less, and perhaps more, than mediocre ones." (Footnote omitted.)

While it might be easier for the school boards to conclusively presume that all pregnant women are unfit to teach past the fourth or fifth month or even the first month, of pregnancy, administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law.¹³ The Fourteenth Amendment requires the school boards to employ alternative administrative means, which do not so broadly infringe upon basic constitutional liberty, in support of their legitimate goals.¹⁴

We conclude, therefore, that neither the necessity for continuity of instruction nor the state interest in keeping

¹³ This is not to say that the only means for providing appropriate protection for the rights of pregnant teachers is an individualized determination in each case and in every circumstance. We are not dealing in these cases with maternity leave regulations requiring a termination of employment at some firm date during the last few weeks of pregnancy. We therefore have no occasion to decide whether such regulations might be justified by considerations not presented in these records—for example, widespread medical consensus about the "disabling" effect of pregnancy on a teacher's job performance during these latter days, or evidence showing that such firm cutoffs were the only reasonable method of avoiding the possibility of labor beginning while some teacher was in the classroom, or proof that adequate substitutes could not be procured without at least some minimal lead time and certainty as to the dates upon which their employment was to begin.

¹⁴ The school boards have available to them reasonable alternative methods of keeping physically unfit teachers out of the classroom. For example, they could require the pregnant teacher to submit to medical examination by a school board physician, or simply require each teacher to submit a current certification from her obstetrician as to her ability to continue work. Indeed, when evaluating the physical ability of a teacher to *return* to work, each school board in this case relies upon precisely such procedures. See nn. 1 and 5, *supra*; see also text, *infra*, at 648-650.

Opinion of the Court

414 U.S.

physically unfit teachers out of the classroom can justify the sweeping mandatory leave regulations that the Cleveland and Chesterfield County School Boards have adopted. While the regulations no doubt represent a good-faith attempt to achieve a laudable goal, they cannot pass muster under the Due Process Clause of the Fourteenth Amendment, because they employ irrebuttable presumptions that unduly penalize a female teacher for deciding to bear a child.

III

In addition to the mandatory termination provisions, both the Cleveland and Chesterfield County rules contain limitations upon a teacher's eligibility to return to work after giving birth. Again, the school boards offer two justifications for the return rules—continuity of instruction and the desire to be certain that the teacher is physically competent when she returns to work. As is the case with the leave provisions, the question is not whether the school board's goals are legitimate, but rather whether the particular means chosen to achieve those objectives unduly infringe upon the teacher's constitutional liberty.

Under the Cleveland rule, the teacher is not eligible to return to work until the beginning of the next regular school semester following the time when her child attains the age of three months. A doctor's certificate attesting to the teacher's health is required before return; an additional physical examination may be required at the option of the school board.

The respondents in No. 72-777 do not seriously challenge either the medical requirements of the Cleveland rule or the policy of limiting eligibility to return to the next semester following birth. The provisions concerning a medical certificate or supplemental physical examination are narrowly drawn methods of protecting the

school board's interest in teacher fitness; these requirements allow an individualized decision as to the teacher's condition, and thus avoid the pitfalls of the presumptions inherent in the leave rules. Similarly, the provision limiting eligibility to return to the semester following delivery is a precisely drawn means of serving the school board's interest in avoiding unnecessary changes in classroom personnel during any one school term.

The Cleveland rule, however, does not simply contain these reasonable medical and next-semester eligibility provisions. In addition, the school board requires the mother to wait until her child reaches the age of three months before the return rules begin to operate. The school board has offered no reasonable justification for this supplemental limitation, and we can perceive none. To the extent that the three-month provision reflects the school board's thinking that no mother is fit to return until that point in time, it suffers from the same constitutional deficiencies that plague the irrefutable presumption in the termination rules.¹⁵ The presumption, moreover, is patently unnecessary, since the requirement of a physician's certificate or a medical examination fully protects the school's interests in this

¹⁵ It is clear that the factual hypothesis of such a presumption—that no mother is physically fit to return to work until her child reaches the age of three months—is neither necessarily nor universally true. See *R. Benson, supra*, n. 12, at 209 (patient may return to "full activity or employment" if course of progress up to fourth or fifth week is normal). Cf. *Comment, Love's Labors Lost: New Conceptions of Maternity Leaves*, 7 *HARV. CIV. RIGHTS-CIV. LIB. L. REV.*, at 262 n. 11, 287 n. 145.

Of course, it may be that the Cleveland rule is based upon another theory—that new mothers are too busy with their children within the first three months to allow a return to work. Viewed in that light, the rule remains a conclusive presumption, whose underlying factual assumptions can hardly be said to be universally valid.

regard. And finally, the three-month provision simply has nothing to do with continuity of instruction, since the precise point at which the child will reach the relevant age will obviously occur at a different point throughout the school year for each teacher.

Thus, we conclude that the Cleveland return rule, insofar as it embodies the three-month age provision, is wholly arbitrary and irrational, and hence violates the Due Process Clause of the Fourteenth Amendment. The age limitation serves no legitimate state interest, and unnecessarily penalizes the female teacher for asserting her right to bear children.

We perceive no such constitutional infirmities in the Chesterfield County rule. In that school system, the teacher becomes eligible for re-employment upon submission of a medical certificate from her physician; return to work is guaranteed no later than the beginning of the next school year following the eligibility determination.¹⁶ The medical certificate is both a reasonable and narrow method of protecting the school board's interest in teacher fitness, while the possible deferring of return until the next school year serves the goal of preserving continuity of instruction. In short, the Chesterfield County rule manages to serve the legitimate state interests here without employing unnecessary presumptions that broadly burden the exercise of protected constitutional liberty.

¹⁶ The Virginia rule also requires that the teacher give assurance that care of the child will not unduly interfere with her job duties. While such a requirement has within it the potential for abuse, there is no evidence on this record that the assurance required here is anything more than that routinely sought by employers from prospective employees—that the worker is willing to devote full attention to job duties. Nor is there any evidence in this record that the school authorities do not routinely accept the woman's assurance of her ability to return.

IV

For the reasons stated, we hold that the mandatory termination provisions of the Cleveland and Chesterfield County maternity regulations violate the Due Process Clause of the Fourteenth Amendment, because of their use of unwarranted conclusive presumptions that seriously burden the exercise of protected constitutional liberty. For similar reasons, we hold the three-month provision of the Cleveland return rule unconstitutional.

Accordingly, the judgment in No. 72-777 is affirmed; the judgment in No. 72-1129 is reversed, and the case is remanded to the Court of Appeals for the Fourth Circuit for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS concurs in the result.

MR. JUSTICE POWELL, concurring in the result.

I concur in the Court's result, but I am unable to join its opinion. In my view these cases should not be decided on the ground that the mandatory maternity leave regulations impair any right to bear children or create an "irrebuttable presumption." It seems to me that equal protection analysis is the appropriate frame of reference.

These regulations undoubtedly add to the burdens of childbearing. But certainly not every government policy that burdens childbearing violates the Constitution. Limitations on the welfare benefits a family may receive that do not take into account the size of the family illustrate this point. See *Dandridge v. Williams*, 397 U. S. 471 (1970). Undoubtedly Congress could, as another example, constitutionally seek to discourage excessive population growth by limiting tax deductions for dependents. That would represent an

intentional governmental effort to "penalize" childbearing. See *ante*, at 640. The regulations here do not have that purpose. Their deterrent impact is wholly incidental. If some intentional efforts to penalize childbearing are constitutional, and if *Dandridge, supra*, means what I think it does, then certainly these regulations are not invalid as an infringement of any right to procreate.

I am also troubled by the Court's return to the "irrebuttable presumption" line of analysis of *Stanley v. Illinois*, 405 U. S. 645 (1972) (POWELL, J., not participating), and *Vlandis v. Kline*, 412 U. S. 441 (1973). Although I joined the opinion of the Court in *Vlandis* and continue fully to support the result reached there, the present cases have caused me to re-examine the "irrebuttable presumption" rationale. This has led me to the conclusion that the Court should approach that doctrine with extreme care. There is much to what MR. JUSTICE REHNQUIST says in his dissenting opinion, *post*, at 660, about the implications of the doctrine for the traditional legislative power to operate by classification. As a matter of logic, it is difficult to see the terminus of the road upon which the Court has embarked under the banner of "irrebuttable presumptions." If the Court nevertheless uses "irrebuttable presumption" reasoning selectively, the concept at root often will be something else masquerading as a due process doctrine. That something else, of course, is the Equal Protection Clause.

These cases present precisely the kind of problem susceptible to treatment by classification. Most school teachers are women, a certain percentage of them are pregnant at any given time, and pregnancy is a normal biological function possessing, in the great majority of cases, a fairly well defined term. The constitutional difficulty is not that the boards attempted to deal with

this problem by classification. Rather, it is that the boards chose irrational classifications.

A range of possible school board goals emerge from the cases. Several may be put to one side. The records before us abound with proof that a principal purpose behind the adoption of the regulations was to keep visibly pregnant teachers out of the sight of school children.¹ The boards do not advance this today as a legitimate objective, yet its initial primacy casts a shadow over these cases. Moreover, most of the after-the-fact rationalizations proposed by these boards are unsupported in the records. The boards emphasize teacher absenteeism, classroom discipline, the safety of schoolchildren, and the safety of the expectant mother and her unborn child. No doubt these are legitimate concerns. But the boards have failed to demonstrate that these interests are in fact threatened by the continued employment of pregnant teachers.

To be sure, the boards have a legitimate and important interest in fostering continuity of teaching. And, even a normal pregnancy may at some point jeopardize that interest. But the classifications chosen by these boards, so far as we have been shown, are either counterproductive or irrationally overinclusive even with regard to this significant, nonillusory goal. Accordingly, in my opinion these regulations are invalid under rational-basis standards of equal protection review.²

¹ See, e. g., *ante*, at 641 n. 9.

² I do not reach the question whether sex-based classifications invoke strict judicial scrutiny, e. g., *Frontiero v. Richardson*, 411 U. S. 677 (1973), or whether these regulations involve sex classifications at all. Whether the challenged aspects of the regulations constitute sex classifications or disability classifications, they must at least rationally serve some legitimate articulated or obvious state interest. While there are indeed some legitimate state interests at stake here, it has not been shown that they are rationally furthered by the challenged portions of these regulations.

POWELL, J., concurring in result

414 U.S.

In speaking of continuity of teaching, the boards are referring in part to their valid interest in reducing the number of times a new teacher is assigned to a given class. It is particularly appropriate to avoid teacher turnover in the middle of a semester, since continuity in teaching approach, as well as teacher-pupil relationships, is otherwise impaired. That aspect of the Cleveland regulation limiting a teacher's eligibility to return to the classroom to the semester following delivery, which the Court approves, *ante*, at 649, rationally serves this legitimate state interest. But the four- and five-month prebirth leave periods of the two regulations and the three-month post-birth provision of the Cleveland regulation do not. As the Court points out, *ante*, at 642-643, such cutoff points are more likely to prevent continuity of teaching than to preserve it. Because the cutoff dates occur throughout the school year, they inevitably result in the removal of many capable teachers from the classroom in the middle or near the end of a semester, thus provoking the disruption the boards hope to avoid.

The boards' reference to continuity of teaching also encompasses their need to assure constant classroom coverage by teachers who are up to the task. This interest is obviously legitimate. No one disputes that a school board must concern itself with the physical and emotional capabilities of its teachers. But the objectionable portions of these regulations appear to be bottomed on factually unsupported assumptions about the ability of pregnant teachers to perform their jobs. The overwhelming weight of the medical testimony adduced in these cases is that most teachers undergoing normal pregnancies are quite capable of carrying out their responsibilities until some ill-defined point a short period prior to term. Certainly the boards have made little effort to contradict this conclusion. Thus, it appears that by forcing all pregnant teachers undergoing a normal

pregnancy from the classroom so far in advance of term, the regulations compel large numbers of able-bodied teachers to quit work.³ Once more, such policies inhibit, rather than further, the goal of continuity of teaching. For no apparent reason, they remove teachers from their students and require the use of substitutes.

The boards' reliance on the goal of continuity of teaching also takes into account their obvious planning needs. Boards must know when pregnant teachers will temporarily cease their teaching responsibilities, so that substitutes may be scheduled to fill the vacancies. And, planning requires both notice of pregnancy and a fixed termination date. It appears, however, that any termination date serves the purpose.⁴ The choice of a cutoff date that produces several months of forced unemployment is thus wholly unnecessary to the planning of the boards. Certainly nothing in the records of these cases is to the contrary.

For the above reasons, I believe the linkage between the boards' legitimate ends and their chosen means is too attenuated to support those portions of the regulations overturned by the Court. Thus, I concur in the Court's result. But I think it important to emphasize the degree of latitude the Court, as I read it, has left the boards for dealing with the real and recurrent problems presented by teacher pregnancies. Boards may demand in every case "substantial advance notice of

³ Teachers who undergo abnormal pregnancies may well be disabled, either temporarily or for a substantial period. But as I read the Court, boards may deal with abnormal pregnancies like any other disability. *Ante*, at 642 n. 10.

⁴ One may question, however, whether planning needs are well served by the mere two-week gap between notice and departure set forth in the Cleveland regulation. The brief notice the Cleveland board has allowed itself casts some doubt on that board's reliance on planning needs.

POWELL, J., concurring in result

414 U.S.

[pregnancy]" *Ante*, at 643. Subject to certain restrictions, they may require all pregnant teachers to cease teaching "at some firm date during the last few weeks of pregnancy. . . ." *Id.*, at 647 n. 13.⁵ The Court further holds that boards may in all cases restrict re-entry into teaching to the outset of the school term following delivery. *Id.*, at 649.

In my opinion, such class-wide rules for pregnant teachers are constitutional under traditional equal protection standards.⁶ School boards, confronted with sensitive and widely variable problems of public education, must be accorded latitude in the operation of school systems and in the adoption of rules and regulations of general application. *E. g.*, *San Antonio Independent School District v. Rodriguez*, 411 U. S. 1, 42-43 (1973). A large measure of discretion is essential to the effective discharge of the duties vested in these local, often elective, governmental units. My concern with the Court's

⁵ The Court's language does not specify a particular prebirth cutoff point, and we need not decide that issue, as these boards have attempted to support only four- and five-month dates. In light of the Court's language, however, I would think that a four-week prebirth period would be acceptable. I do not agree with the Court's view of the stringent standards a board must meet to justify a reasonable prebirth cutoff date. See *ante*, at 647 n. 13. Nothing in the Constitution mandates the heavy burden of justification the Court has imposed on the boards in this regard. If school boards must base their policies on a "widespread medical consensus . . .," the "only reasonable method . . ." for accomplishing a goal, or a demonstration that needed services will otherwise be impossible to obtain, *ibid.*, they may be seriously handicapped in the performance of their duties.

⁶ As the Court notes, these cases arose prior to the recent amendment extending Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, to state agencies and educational institutions. Pub. L. 92-261, 86 Stat. 103. See *ante*, at 639 n. 8. Like the Court, I do not address the impact of Title VII on mandatory maternity leave regulations.

opinion is that, if carried to logical extremes, the emphasis on individualized treatment is at war with this need for discretion. Indeed, stringent insistence on individualized treatment may be quite impractical in a large school district with thousands of teachers.

But despite my reservations as to the rationale of the majority, I nevertheless conclude that in these cases the gap between the legitimate interests of the boards and the particular means chosen to attain them is too wide. A restructuring generally along the lines indicated in the Court's opinion seems unavoidable. Accordingly, I concur in its result.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The Court rests its invalidation of the school regulations involved in these cases on the Due Process Clause of the Fourteenth Amendment, rather than on any claim of sexual discrimination under the Equal Protection Clause of that Amendment. My Brother STEWART thereby enlists the Court in another quixotic engagement in his apparently unending war on irrebuttable presumptions. In these cases we are told that although a regulation "requiring a termination of employment at some firm date during the last few weeks of pregnancy" (n. 13, opinion of the Court), might pass muster, the regulations here challenged requiring termination at the end of the fourth or fifth month of pregnancy violate due process of law.

AS THE CHIEF JUSTICE pointed out in his dissent last year in *Vlandis v. Kline*, 412 U. S. 441, "literally thousands of state statutes create classifications permanent in duration, which are less than perfect, as all legislative classifications are, and might be improved on by individualized determinations . . ." *Id.*, at 462. Hundreds of years ago in England, before Parliament came to be thought of as a body having general lawmaking power,

controversies were determined on an individualized basis without benefit of any general law. Most students of government consider the shift from this sort of determination, made on an *ad hoc* basis by the king's representative, to a relatively uniform body of rules enacted by a body exercising legislative authority, to have been a significant step forward in the achievement of a civilized political society. It seems to me a little late in the day for this Court to weigh in against such an established consensus.

Countless state and federal statutes draw lines such as those drawn by the regulations here which, under the Court's analysis, might well prove to be arbitrary in individual cases. The District of Columbia Code, for example, draws lines with respect to age for several purposes. The Code requires that a person to be eligible to vote be 18 years of age,¹ that a male be 18 and a female be 16 before a valid marriage may be contracted,² that alcoholic beverages not be sold to a person under age 21 years,³ or beer or light wines to any person under the age of 18 years.⁴ A resident of the District of Columbia must be 16 years of age to obtain a permit to operate a motor vehicle,⁵ and the District of Columbia delegate to the United States Congress must be 25 years old.⁶ Nothing in the Court's opinion clearly demonstrates why its logic would not equally well sustain a challenge to these laws from a 17-year-old who insists that he is just as well informed for voting purposes as an 18-year-old, from a 20-year-old who insists that he is just as able to carry his liquor as a 21-year-old, or from the numerous other

¹ D. C. Code Ann. § 1-1102 (1973).

² *Id.*, § 30-103.

³ *Id.*, § 25-121.

⁴ *Ibid.*

⁵ *Id.*, § 40-301.

⁶ *Id.*, § 1-291 (b) (2).

persons who fall on the outside of lines drawn by these and similar statutes.

More closely in point is the jeopardy in which the Court's opinion places longstanding statutes providing for mandatory retirement of government employees. 5 U. S. C. § 8335 provides with respect to Civil Service employees:

"(a) Except as otherwise provided by this section, an employee who becomes 70 years of age and completes 15 years of service shall be automatically separated from the service. . . ."

It was pointed out by my Brother STEWART only last year in his concurring opinion in *Roe v. Wade*, 410 U. S. 113, 168, that "the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights. . . . Cf. . . . *Truax v. Raich*, 239 U. S. 33, 41." In *Truax v. Raich*, the Court said:

"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure." 239 U. S. 33, 41 (1915).

Since this right to pursue an occupation is presumably on the same lofty footing as the right of choice in matters of family life, the Court will have to strain valiantly in order to avoid having today's opinion lead to the invalidation of mandatory retirement statutes for governmental employees. In that event federal, state, and local governmental bodies will be remitted to the task, thankless both for them and for the employees involved, of individual determinations of physical impairment and senility.

REHNQUIST, J., dissenting

414 U.S.

It has been said before, *Williamson v. Lee Optical Co.*, 348 U. S. 483 (1955), but it bears repeating here: All legislation involves the drawing of lines, and the drawing of lines necessarily results in particular individuals who are disadvantaged by the line drawn being virtually indistinguishable for many purposes from those individuals who benefit from the legislative classification. The Court's disenchantment with "irrebuttable presumptions," and its preference for "individualized determination," is in the last analysis nothing less than an attack upon the very notion of lawmaking itself.

The lines drawn by the school boards in the city of Cleveland and Chesterfield County in these cases require pregnant teachers to take forced leave at a stage of their pregnancy when medical evidence seems to suggest that a majority of them might well be able to continue teaching without any significant possibility of physical impairment. But, so far as I am aware, the medical evidence also suggests that in some cases there may be physical impairment at the stage of pregnancy fastened on by the regulations in question, and that the probability of physical impairment increases as the pregnancy advances. If legislative bodies are to be permitted to draw a general line anywhere short of the delivery room, I can find no judicial standard of measurement which says the ones drawn here were invalid. I therefore dissent.

